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In The

Supreme Court of the United States

October Term, 1998

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a commercial contractor who claims that a public agency breached a contract by failing to make payment entitled by the Due Process Clause of the Fourteenth Amendment to anything more than the opportunity to pursue its contract claim through an ordinary state court lawsuit?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Victoria L. Bradshaw[1], Lloyd W. Aubry, Jr.[2], Daniel Dellarocca, Roger Miller, Rosa Frazier, the Division of Labor Standards Enforcement, and the Department of Industrial Relations of the State of California, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above action on September 10, 1998.

OPINIONS BELOW

The judgment of the District Court, entered on November 9, 1995, is not reported but is reprinted in the appendix to this petition at A-72. The original opinion of the United States Court of Appeals for the Ninth Circuit is reported at 136 F.3d 587 (9th Cir. 1998) and is reprinted at A-39. The Ninth Circuit issued a subsequent order and amended opinion on September 10, 1998, reported at 156 F.3d 893 (9th Cir. 1998), and reprinted at A-1. On October 28, 1998, the Ninth Circuit issued an order denying the State's petition for rehearing, reprinted at A-75.

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[1] Victoria L. Bradshaw was sued in her official capacity as Labor Commissioner of the State of California, a position she held when this litigation commenced. The position is presently unfilled, and the duties of that office are currently being performed by Jose Millan, the Chief Deputy Labor Commissioner.

[2] Lloyd W. Aubry, Jr., was sued in his official capacity as Director of the Department of Industrial Relations of the State of California, a position he held when this litigation commenced. Stephen J. Smith is the current Director.

JURISDICTION

The Ninth Circuit issued its amended opinion and judgment on September 10, 1998. A timely petition for rehearing and rehearing en banc was denied on October 28, 1998. This petition for writ of certiorari is filed within ninety days of the denial of rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

42 U.S.C. § 1983 provides, in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The relevant California statutory provisions are reproduced in the appendix at A-77, and include California Labor Code sections 1720, 1727, 1729, 1730, 1731, 1732, 1733, 1771, 1772, 1773, 1773.2, 1774, 1775, 1776, and 1813, and California Civil Code sections 3103, 3181, 3184, 3186, 3210.

STATEMENT OF THE CASE

A. Facts

Petitioners are state officials and the state agencies, the Division of Labor Standards Enforcement ("DLSE")

and the Department of Industrial Relations, responsible for the enforcement of California's prevailing wage law. Respondent, G & G Fire Sprinklers, Inc. ("G & G"), is a fire protection company that installs fire sprinkler systems. G & G both contracts directly with building owners or, as here, does not contract directly with the building owner but instead, agrees to perform the specialized sprinkler installation as a subcontractor for a prime contractor. When the building owner is a California governmental entity, the construction work is a "public work."[3] On public works, the prime contractor agrees, in its contract with the governmental entity, that its construction workers, and those of the subcontractors whom it later selects to execute the contract, will be paid "prevailing wages."[4] (A-9,10.)

This case arose when DLSE, pursuant to California Labor Code § 1727, and following investigations of prevailing wage law violations concerning three separate projects, issued notices to withhold public works contract payments from the prime contractors because G & G, a subcontractor, failed to pay prevailing wages to its workers on all three projects, and in one of those projects failed to provide DLSE with certified payroll records. Following issuance of the notices to withhold, the awarding bodies for each of the projects withheld money from the prime contractors. The prime contractors, in turn,

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[3] The term "public work" is defined at Cal. Labor Code § 1720 to include "construction, alteration, demolition, or repair work done under contract and paid in whole or in part out of public funds. . . . "

[4] Prevailing wages are fixed for each construction craft or classification in the locality in which the public work is performed. The procedure for determining prevailing wages is set out at Cal. Labor Code § 1773.

withheld payments otherwise due under their subcontracts from G & G, as authorized by California Labor Code § 1729.

The obligation to pay prevailing wages on a public works project, and to provide DLSE with certified payroll records, is founded upon both statute and contract. California Labor Code sections 1771 and 1774 require contractors and subcontractors to pay prevailing wages to all workers employed on a public works project. The requirement to pay prevailing wages must be included as an express stipulation in any such public works contract. (Cal. Labor Code § 1773.2 and 1775).

In order to ensure the proper payment of prevailing wages, all public works contractors and subcontractors are required to keep certified payroll records showing the names, job classifications, hours worked, and wages paid to all workers employed on the project. (Cal. Labor Code § 1776(a)). These certified payroll records must be made available, by the contractor and subcontractor, to DLSE upon request. (Cal. Labor Code § 1776(b)). Every public works contract must contain express stipulations concerning the requirements to maintain and furnish DLSE with copies of these certified payroll records. (Cal. Labor Code § 1776(h)).

California Labor Code § 1775 provides for penalties if workers are paid less than the prevailing wage, and requires that every public works contract contain provisions authorizing the imposition of these penalties. Likewise, as a matter of state law, all public works contracts must contain provisions authorizing the imposition of penalties for failure to provide DLSE with certified payroll records. (Cal. Labor Code § 1776(g) and (h)). Further, contractors and subcontractors are subject to a penalty if any worker employed on a public works project is required or permitted to work more than eight hours in

one day or 40 hours in one week. Here too, every public works contract must contain a provision for the imposition of such penalties. (Cal. Labor Code § 1813).

Thus, all of the prime contractors that subcontracted work to G & G had agreed to the following contractual provisions in their public works contracts with the respective awarding bodies: (1) that prevailing wages would be paid to all workers employed on the project by the prime contractor and its subcontractors, (2) that certified payroll records would be kept, and provided to DLSE upon request, showing the hours worked and wages paid to all workers employed on the project by the prime contractor and its subcontractors, and (3) that the public agencies that had awarded the contracts could withhold contract payments to cover unpaid wages and penalties if the agreements were breached. (A-19)

Pursuant to California Labor Code § 1727, the public entity that awarded the contract must "withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter." The withholding must be preceded by a "full investigation" by either DLSE or by the awarding body, except in the case of a final payment.

A withholding of payments from a prime contractor for unpaid prevailing wages and penalties can be challenged by filing a lawsuit to recover the withheld funds.[5] (Cal. Labor Code § 1730-1733.) Any such funds withheld

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[5] The public agency which is buying the construction work (pursuant to the various specifications, including the agreement to pay the prevailing wage) is buying the construction work from the prime contractor – not its subcontractors, who may be unknown to the public agency at the time the contract is awarded. The withholding under Cal. Labor Code § 1727 is only from payments to the prime contractor.

from a public works contractor must be retained by the awarding body for 90 days following the completion of the contract. During that period, the contractor or his or her assignee may file a state court breach of contract action against the awarding body to recover the withheld funds. This breach of contract action "is the exclusive remedy of the contractor or his or her assignees" for the recovery of withheld wages and penalties. (Cal. Labor Code § 1732.) The action may be filed "without permission from the state or other authority," and it is "limited to the recovery of the wages or penalties" without prejudice to any other rights or issues arising under the contract. (Cal. Labor Code § 1733.) DLSE may defend the lawsuit upon the request of the awarding body. If an action is not brought within this retention period, the awarding body must transfer the withheld funds to DLSE, and DLSE in turn disburses the withheld unpaid wages to the underpaid workers. If an action is brought within the retention period, the money is held in escrow until its resolution. These statutory provisions have been in effect for over sixty years.

Pursuant to California Labor Code § 1729, a prime contractor who has had a payment withheld by a public agency, as a result of a subcontractor's failure to comply with its prevailing wage obligations, can in turn withhold that amount from the funds the prime contractor would otherwise owe to the subcontractor under the subcontract. With an assignment from the prime contractor, the subcontractor can then file a breach of contract action under California Labor Code § 1730-1733 to recover these funds from the public agency. If the subcontractor proceeds by way of assignment, that lawsuit is the subcontractor's exclusive remedy for the recovery of the withheld funds. (Cal. Labor Code § 1732.) But if the

subcontractor does not obtain an assignment, the subcontractor can pursue an alternative statutory remedy under the California Civil Code, consisting of the right to file a "stop notice", setting forth the amount owed by the prime contractor to the subcontractor for work performed under the subcontract. The stop notice is filed with the public agency that awarded the contract. (Cal. Civil Code § 3103, 3181, 3184.) Upon receipt of a timely stop notice, the public agency is obligated to withhold from the prime contractor an amount sufficient to pay the claim stated by the subcontractor. (Cal. Civil Code § 3186.) The subcontractor may file "an action against the [prime] contractor and the public entity to enforce payment of the claim stated in the stop notice . . . at any time after 10 days from the date of the service of the stop notice upon the public entity. . . . " (Cal. Civil Code § 3210.)

The record herein contains no evidence (and no party has alleged) that either G & G, or any of its prime contractors, filed any state court actions claiming that G & G had not violated the contract specifications so as to be entitled to payment of the withheld amounts with respect to the three public works contracts on which funds were withheld. The evidence and pleadings do not reveal that any breach of contract actions to recover the withhheld amounts were filed pursuant to California Labor Code § 1730-1733, or that G & G filed any stop notices under the Civil Code in connection with any of these public works contracts.

B. Proceedings Below

G & G brought this action for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201-2202, claiming that the issuance of the notices to withhold without a prior hearing constitutes a deprivation of property without due process of law, in violation

of the Fourteenth Amendment. The state responded with a motion to dismiss, and G & G later filed a motion for summary judgment. The district court denied the state's motion to dismiss and granted G & G's motion for summary judgment. The district court's judgment declared sections 1727, 1730-1733, 1775, 1776(g) and 1813 of the California Labor Code unconstitutional, and enjoined the state from enforcing those statutes against G & G.

On February 3, 1998, Judge Hawkins, joined by Judge Reinhardt, issued an opinion, in part affirming and in part reversing the district court, and remanding the case for further proceedings consistent with the opinion. Judge Kozinski vigorously dissented. The panel majority held that due process requires that the state provide a subcontractor with either a pre- or prompt post-deprivation hearing when withholding payments from a public works contractor for unpaid wages or penalties. This holding is founded upon the majority's view that a subcontractor "has a property interest in being paid in full for the construction work it completed," and that this interest, which "arises from *its*[6] public works contract," is protected by the due process clause. (A-50, italics and footnote added.)[7] The panel concluded, however, that the district court's injunction was overbroad in that the challenged withholding provisions, while unconstitutional as applied, were not facially invalid.

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[6] No party contended at any stage in this litigation that G & G, with respect to the three public works contracts at issue herein, was anything but a subcontractor – i.e., that it (rather than the prime contractors) had entered into any contracts with these public agencies.

[7] This quote is also found at A-17 in the Amended Opinion that the Ninth Circuit issued on September 10, 1998. Subsequent citations will refer only to the Amended Opinion.

In his dissent, Judge Kozinski protested the majority's "categorical approach that turns every right to receive payment on a public works contract into a property right protected by due process." (A-35) Instead, Judge Kozinski insisted that any rights arising under commercial contracts, such as service contracts, material supply contracts, and construction contracts, are not protected by the due process clause.

Judge Kozinski warned that the majority decision not only conflicts with the opinions of other circuits, but that it is "very bad policy" because it saddles the state, when it engages in "the purely commercial activity of construction", with "a burden not suffered by private builders", who routinely put provisions for payment withholdings for failure (or suspected failure) of performance into their private construction contracts. (A-36) Judge Kozinski explained that payment withholdings are consistent with the awarding bodies' activities as market participants, and that any contractor or subcontractor who objects to provisions for withholdings is free not to do business with the state. Consequently, a dispute over withholdings is nothing more than a "run-of-the-mill contract dispute", for which the subcontractors' remedy lies in a state court breach of contract action against the prime contractor, or, as an assignee of the prime contractor, against the awarding body. (A-37)

Finally, Judge Kozinski cautioned that drastic consequences would result from the majority decision, as due process requirements would inexorably apply to *any* withholding of payments under a commercial contract with the state, be it a withholding for failure to pay prevailing wages, or in more mundane instances, a failure to complete a project on time or a failure to comply with applicable building codes.

The state petitioned for rehearing. This petition was granted, and on September 10, 1998, the panel issued an amended opinion and order. Once again, the panel split with Judge Kozinski in the minority. The only significant change in the majority's opinion is its concession that "the state's interest in ensuring payment of prevailing wages is sufficiently important to justify the withholding of funds pending the outcome of whatever kind of hearing may be afforded." (A-22, internal citation and quotation omitted.) Thus, the majority concluded that a pre-deprivation hearing is not required, but that a prompt post-deprivation hearing is necessary to satisfy due process requirements.

In his dissent to this amended opinion, Judge Kozinski found that under California law, every subcontractor who wishes to challenge a withholding has an adequate state law remedy. Under California Labor Code § 1733, a subcontractor with an assignment from the contractor can file a breach of contract action against the awarding body to recover sums withheld.[8] Furthermore, Judge Kozinski noted, any subcontractor unable to obtain an assignment but whose payment had been withheld by the prime contractor could bring suit against the awarding body under the theory of equitable subrogation.

The panel majority, however, concluded that even if the aggrieved subcontractor could bring an action on the contract, that would not be sufficient. While conceding that the U.S. Supreme Court has held that in certain circumstances, a post-deprivation state court action may fulfill the requirements of due process, the majority held

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[8] G & G never alleged that any of its prime contractors refused, or for that matter, were ever asked to assign their rights to G & G to bring contract actions against the awarding bodies for the recovery of the withheld funds.

that the right to bring a breach of contract action to recover withheld payments, when the withholding was carried out by state officials pursuant to state policy, does not provide adequate due process.

The state filed a timely petition for rehearing and suggested rehearing en banc. On October 28, 1998, the court entered an order denying the petition for rehearing, though indicating that Judge Kozinski had voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit held in this case that a commercial contractor who claims that a public agency that has breached a contract by failing to make payment is entitled to more by the Fourteenth Amendment's Due Process Clause than the opportunity to litigate its contract dispute through an ordinary breach of contract lawsuit. This novel holding is in conflict with the decisions of every other circuit that has considered this issue. Both the doctrinal and practical consequences of the holding make this case worthy for review.

The impact of this Ninth Circuit decision carries far beyond California's borders. The issues of whether a constitutionally protected property right can be founded upon a commercial contract with a public entity, and if so, whether existing state law breach of contract remedies provide adequate due process, are of enormous consequence to every state, county, city, school district, and special use district in the nation. The *G & G* decision constitutes an enormous departure from the conclusions that every other circuit has reached when faced with these questions. The Supreme Court has never addressed these issues before. Determination of these issues by this Court is now imperative.

A. Conflict Exists Among the Circuits as to Whether Constitutionally Protected Property Rights Can Be Founded Upon a Commercial Contract With a State Agency.

There is a direct conflict between the decision of the Ninth Circuit in this case and the decisions of the Second Circuit in *S & D Maintenance Co. v. Goldin*, 844 F.2d 962 (2nd Cir. 1988), *Martz v. Village of Valley Stream*, 22 F.3d 26 (2nd Cir. 1994), and *Christ Gatzonis Electrical Contractor, Inc. v. New York City School Construction Authority*, 23 F.3d 636 (2nd Cir. 1994). In each of these Second Circuit cases, contractors[9] filed actions under 42 U.S.C. § 1983 against public agencies that had withheld contract payments, asserting that the withholdings without hearings constituted a violation of due process. The Second Circuit held that the contractual relationship between a contractor and a public agency does not create a constitutionally protected interest in the payment of sums allegedly due pursuant the contract. In a nuanced analysis that distinguishes between ordinary contract rights and property rights that are protected under the Due Process Clause, the Second Circuit reasoned:

> "An interest in enforcement of an ordinary commercial contract with a state is qualitatively different from the interests the Supreme Court has thus far viewed as "property" entitled to procedural due process protection. . . . [T]he Due Process Clause is invoked to protect something more than an ordinary contractual right. Rather,

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[9] S & D Maintenance had a contract to maintain city parking meters, Martz was a private attorney with a contract to provide legal services for a municipality, and Christ Gatzonis Electrical Contractor had construction contracts with the public agency that oversees construction and repair work at city schools.

> procedural protection is sought in connection with a state's revocation of a status, an estate within the public sphere characterized by a quality of either extreme dependence in the case of welfare benefits, or permanence in the case of tenure, or sometimes both, as frequently occurs in the case of social security benefits. . . . But we hesitate to extend the doctrine further to constitutionalize contractual interests that are not associated with any cognizable status of the claimant beyond its temporary role as a governmental contractor." *S & D Maintenance Co., supra,* 844 F.2d at 966-67.

This analysis, distinguishing ordinary contract rights from the sort of property that is protected by due process, resonates in the decisions of several other circuits. Justice Breyer, then on the First Circuit, wrote: "A mere breach of a contractual right is not a deprivation of property without constitutional due process of law. . . . Otherwise virtually every controversy involving an alleged breach of contract by a government or governmental institution or agency or instrumentality would be a constitutional case." *Bleeker v. Dukakis,* 665 F.2d 401, 403 (1st Cir. 1981). The Seventh Circuit, in affirming the dismissal of a section 1983 action brought by county employees asserting that the county violated their due process rights by its refusal to abide by a contract to permit time off in compensation for overtime hours worked, cautioned that "[t]here is reason to doubt whether the Fourteenth Amendment was intended to allow every person with a breach of contract claim against a state to bring that claim in federal Court", and that the Amendment was "not intended to shift the whole of the public law of the states into the federal courts." *Brown v. Brienen,* 722 F.2d 360, 364 (7th Cir. 1983).

The Third Circuit has likewise observed that "if every breach of contract by someone acting under color

of state law constituted a deprivation of property for procedural due process purposes, the federal courts would be called upon to pass judgment on procedural fairness of the processing of a myriad of contractual claims against public entities," and that the "wholesale federalization of state public contract law seems far afield from the great purposes of the due process clause." *Reich v. Beharry*, 883 F.2d 239, 242 (3rd Cir. 1989). Following this analysis, the Third Circuit upheld a summary judgment against a building contractor as to a section 1983 claim asserting a protectable property interest in its contract with a city housing authority, while permitting the contractor's claim for unpaid compensation for work allegedly performed under the contract to proceed under the state public contract law. *Linan-Faye Construction Co., Inc. v. Housing Authority of the City of Camden*, 49 F.3d 915 (3rd Cir. 1995). The court further held that whatever severe consequential damages the contractor may have suffered as a result of the housing authority's allegedly wrongful retention of the contractor's performance bond, that fact "cannot convert a contract claim into a deprivation of liberty." *Ibid.*, at 932.

With its decision in *G & G*, the Ninth Circuit became the only circuit to find a property right, protectable under the Fourteenth Amendment, in a contract between a public agency and a contractor. The Second and Third Circuits have both directly held otherwise in cases involving public contractors' claims for payment of amounts purportedly owed pursuant to their contracts. The First and Seventh Circuits have also reached conclusions contrary to the holding of the *G & G* panel majority. Moreover, as Judge Kozinski observed in his dissent, the Ninth Circuit itself is now in disagreement on this issue. Prior to *G & G*, the Ninth Circuit had stood in the mainstream of circuit law on the issue. In *San Bernardino Physicians' Services*

Medical Group, Inc. v. County of San Bernardino, 825 F.2d 1404, 1408 (9th Cir. 1987), the court explained "[e]ven though every contract may confer some legal rights under state law, that fact alone need not place all contracts within federal due process protection." In drawing the line between those government contracts that may create rights that are protected by the Fourteenth Amendment and those that do not, the court focused on the distinction between employment contracts and ordinary commercial contracts, such as contracts to perform a construction project or to supply the state with services or materials. "The right of an individual not to be deprived of employment that he or she has been guaranteed is more easily characterized as a civil right, meant to be protected by section 1983, than are many other contractual rights." *Ibid.* at 1409. Consequently, "the farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend it constitutional protection without subsuming the entire state law of public contracts." *Ibid.* Stemming from this analysis, the court held that a corporation's contract to supply medical services to a county hospital does not implicate any constitutionally protected interest, and that such a "contract to supply services to the state cannot sensibly be distinguished from construction contracts or even purely material supply contracts, for purposes of federal protection." *Ibid.* at 1410.

The *G & G* panel majority abandoned this restrained approach in favor of a sweeping expansion of property rights and due process protections. Its holding rests squarely on the existence of a public contract, a fact common to all of the cases discussed above in which every other circuit found no constitutionally protected property rights. G & G's constitutional claim, according

to the panel majority, "arises from its public works contract; it has a property interest in being paid in full for the construction work it has completed."[10] (A-17) Assuming, *arguendo*, that a subcontractor that lacks privity of contract with an awarding body can nonetheless assert a claim based on the awarding body's contract with the prime contractor, the question that must be carefully analyzed is whether, under either the public works contract or applicable state law, there is an entitlement to prompt payment in full once the job is purportedly completed. The answer to this question is that under the California prevailing wage law, and under the contracts that G & G rely on as a basis for its due process claim, there is no entitlement to payment of sums withheld for unpaid wages and penalties. These contracts expressly provide for the withholding of payments to cover unpaid wages and penalties. (A-19) The contractor's right to payment in full is contingent not only on completion of

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[10] Of course, the public works contracts upon which G & G asserts this "property interest" were contracts between public agencies and prime contractors, who in turn subcontracted part of the work to G & G. The sums withheld by the public agencies were withheld from the prime contractors in accordance with the agencies' contracts with the prime contractors. The fact that there was no privity between G & G and the awarding bodies was of no consequence to the panel majority. The decision is thus fundamentally at odds with *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 788-789, 100 S.Ct. 2467, 2477, 65 L.Ed.2d 506 (1980), where, in holding that nursing home residents had no constitutional right to a hearing to challenge a government revocation of the nursing home's authority to provide them with nursing care at government expense, the Supreme Court observed that in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551, 20 L.Ed. 287 (1870), "[o]ver a century ago this Court recognized the principle that the due process provision . . . does not apply to the indirect adverse effects of governmental action."

the work, but also on the contractor's and its subcontractors' compliance with prevailing wage and certified payroll record keeping requirements.

In both *S & D Maintenance* and *Christ Gatzonis Electrical Contractor*, the Second Circuit held that there can be " 'no legitimate claim of entitlement' to funds allegedly due" pursuant to a "contract [that] vested the municipal official with the discretion to withhold interim payments." *Christ Gatzonis Electrical Contractor, Inc., supra*, 23 F.3d at 640. This holding stems from the application of the well known test adopted in *Board of Regents v. Roth*, 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-09, 33 L.Ed.2d 548 (1972). Under this test, "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . . " 408 U.S. at 577, 92 S.Ct. at 2709.

In contrast, the Ninth Circuit *G & G* panel majority looks beyond state law, and beyond the state's contracts, to the Constitution as an independent source of property rights. Ultimately unable to find any basis for G & G's asserted property interest in the provisions of the public works contracts or in state law, the panel majority relies on *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), to conclude that although G & G has no right to prompt payment (and no right to a deprivation hearing) under the state's statutory scheme (A-19), any withholding under this scheme is constitutionally infirm. *Sniadach*, however, does not provide any basis for peremptorily resolving this circuit conflict in favor of the *G & G* panel majority. In a garnishment case such as *Sniadach*, a creditor seeks to seize funds that are indisputably owed by a third party to the debtor. The funds being seized are the debtor's property. In contrast, in a public works contract case such as this, there is a

substantive dispute between the immediate parties to the contract as to whether the contract requires payment of the amounts withheld. The awarding body did promise to make the payment; but the contractor promised that prevailing wages would be paid and that certified payroll records would be kept and made available as conditions precedent to receiving payment. To say that the contractor is entitled to the withheld funds, and therefore that the state's failure to make payment has deprived the contractor of its "property" without due process of law, is to decide the merits of the *substantive* dispute – a dispute founded upon a breach of contract claim – between the contracting parties.

The Ninth Circuit mischaracterized the nature of the "property interest" in this dispute. When the parties to a bilateral contract dispute whether certain sums are owed under that contract, those sums cannot fairly be said to be the "property" of either party until the dispute is resolved. The most that can be said is that the contractor has a due process property interest in its *claim* for breach of contract. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 101 S.Ct. 1148, 71 L.Ed.2d 265 (1982). And, as discussed in subsection C, *infra*, a lawsuit in state court – a remedy that is available to any public works contractor or subcontractor – is an adequate means of resolving the disputed claim.

B. The Ninth Circuit's Holding that the State, in Enforcing the Provisions of a Public Works Contract, Acts as a Regulator Rather than a Market Participant, Conflicts With Applicable Supreme Court Precedent.

Underlying the panel majority's refusal to characterize this payment withholding as nothing more than a garden-variety contract dispute is its insistence that

because the contractual provisions authorizing the withholding were required by state law, the state here is acting as regulator, rather than as a mere party to a contract. The majority thus recasts this contract dispute as "a direct constitutional challenge to the state's regulatory power as embodied in these statutes." (A-19) And that, for the majority, becomes dispositive – because the contractual provisions for withholding payments had to be inserted in the contracts as a matter of state law, the state is precluded from enforcing these provisions without a deprivation hearing. Since states, and their subordinate parts, normally promulgate their standard contract requirements by some official public means – statutes, regulations, ordinances, or resolutions – the implications of the Ninth Circuit's holding are truly enormous. Judge Kozinski's dissent underscores the novelty of this holding, and the ways in which it subjects the state, in its role as a market participant, to burdens not shared by any private property developer.

Prevailing wage laws only apply to public works projects, that is, to projects owned and funded by the State or one of its political subdivisions. As Judge Kozinski aptly pointed out in his dissent, in the area of public works, the state is engaged in a commercial activity, and in that context, the state should be free to contract under whatever terms it wishes, much the same as any private builder, subject of course, to the same prohibitions against unlawful discrimination that would apply to any builder. The state should have the same freedom as private parties to put both "traditional" and "exotic" terms into a construction contract – terms that may include the construction specifications, completion dates, health and safety codes, building codes, record keeping requirements, prevailing wage requirements, and payment withholdings for a breach of any of these terms. The

private builder who believes that a contractor has failed to perform some part of the contract – for example, the plumbing that was installed does not comply with the applicable building code – may resort to "the standard remedy" of withholding payments. There is no reason to allow the state any less. As Judge Kozinski explained, the fact that the California Labor Code requires the inclusion of prevailing wage and payment withholding provisions in all public works contracts is of no consequence, because no contractor or subcontractor is forced to comply unless he agrees to do business with the state.

Judge Kozinski's dissent is founded upon the long acknowledged right of a state to dictate the terms and conditions for the performance of public works contracts. In *Atkin v. Kansas*, 191 U.S. 207, 24 S.Ct. 124, 48 L.Ed. 148 (1903), the Supreme Court upheld a state law providing for maximum hours of work and requiring minimum rates of pay on public works projects. The Court stated:

> "It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect." 191 U.S. at 222-223, 24 S.Ct. at 127-128.

In *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127, 60 S.Ct. 869, 876, 84 L.Ed. 1108 (1940), the Court, in upholding the Public Contracts Act, observed, "[l]ike private individuals and businesses, the government enjoys the unrestricted power to . . . determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."

In commerce clause cases, the Court has recognized this distinction between the special role of the state as a "market participant" and its more general role as a regulator, so that when the state is operating as a market participant, buying or selling goods or services, "its business methods . . . are of no greater constitutional concern than those of a private business." *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 277, 108 S.Ct. 1803, 1809, 100 L.Ed.2d 302 (1993). These cases highlight "the similarities of private businesses and public entities when they function in the marketplace," and hold that "when acting as proprietors, States should similarly share existing freedoms from federal constraints. . . . " *Reeves, Inc. v. Stake*, 447 U.S. 429, 439, 100 S.Ct. 2271, 2278-79, 65 L.Ed.2d 244 (1980).

Likewise, in its analysis of the preemptive effect of certain federal laws, the Supreme Court has not hesitated to distinguish between state proprietary and regulatory functions, recognizing that, as a general matter, federal statutes are not to be construed as preempting state actions that are undertaken in its proprietary capacity. Thus, in *Building & Construction Trades Council v. Associated Builders and Contractors*, 507 U.S. 218, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) ["Boston Harbor"], the Court explained:

> "To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into [specific contractual terms], a public entity *as purchaser* should be permitted to do the same. . . . In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a

> restriction." 507 U.S. at 231-232, 113 S.Ct. at 1198. (emphasis in original.)

Thus, when purchasing construction services, a public entity that requires contractors to enter into a specific agreement in order to obtain the contract, "does not 'regulate' the workings of the market forces . . . it exemplifies them." *Ibid.*, 507 U.S. at 233, 113 S.Ct. at 1199, quoting from the Court of Appeals dissent authored by J. Breyer in the case below.

In withholding payments in the amount of any unpaid wages plus pre-established penalties, pursuant to express contractual provisions, the state's public agencies were only doing what any private builder could have done. The well-settled principles enunciated in *Atkin, Lukens,* and the more contemporary cases spring from a simple concept: when the state is operating in the marketplace in the same manner as a private business, it will function at a disadvantage, to the detriment of the citizens it serves, if it is held to a different standard, in the conduct of its proprietary functions, than a private business. The *G & G* decision is fundamentally at odds with this concept.

In failing to see this dispute for what it is – a contract dispute between a public works subcontractor and public agencies in their role as market participants, the panel majority has opened the floodgates to a deluge of constitutional claims involving contractors' and subcontractors' newly created property rights. As Judge Kozinski makes clear, under the logic of this decision, deprivation hearings will invariably be required whenever a public agency seeks to withhold contract payments as a consequence of the contractor's breach. And as long as the contract provisions at issue are required or inserted pursuant to state law or local ordinances (e.g., workplace health and safety laws, anti-discrimination laws, building

and fire codes, workers' compensation insurance requirements, licensing and bonding requirements, etc.), the Ninth Circuit would find not a contract dispute, but "a direct constitutional challenge to the state's regulatory power." (A-19) The ostensible limits placed on this decision by the majority are not limits at all, and in short order, virtually every commercial contract dispute involving a public agency will be cloaked in constitutional trappings.

C. Conflict Exists Among the Circuits as to Whether a Breach of Contract Action to Recover Amounts Purportedly Due Under a Contract With a Public Agency Provides a Sufficient Remedy.

The *G & G* panel majority held that a state court breach of contract action to recover the withheld funds does not provide adequate due process. Because the Court of Appeal viewed the availability of a breach of contract lawsuit as insufficient to satisfy due process, it failed to focus on what should have been the dispositive issue in this case: whether state law does provide such a remedy to a public works subcontractor. G & G claimed that state law provided it with no remedy at all in the *hypothetical* event of a contractor refusing to assign its contract claim. The Ninth Circuit expressed "doubt" that a subcontractor without an assignment would have any remedy, based on the absence of state law on this issue. (A-24) The question, though, in a due process case is whether the plaintiff has been denied due process, not whether such a denial might theoretically occur. And a plaintiff certainly does not sustain its burden in a facial due process attack on state statutes merely by demonstrating ambiguity, even if that ambiguity leads to some "doubt" as to whether the state scheme would meet constitutional standards in practice. Rather, considerations of

judicial restraint and respect for state sovereignty require that the plaintiff actually prove the non-existence of an adequate state procedural remedy, or at the very least, allege that some attempt was made to secure its rights through existing state remedies.

Here, there is no evidence in the record (nor any allegation in the pleadings) that G & G attempted to obtain the assignments from the prime contractors that it claimed to need. Nor does the record contain any evidence (or allegation) that G & G sought to pursue any of its state law remedies in the absence of such an assignment. Three separate state law remedies were available. First, G & G could have sued its prime contractors for breach of contract to recover the withheld payments. Cal. Labor Code § 1729 does no more than permit a prime contractor to withhold payments from a subcontractor "on account of the subcontractor's failure to comply with the terms of this chapter" – it does not permit the withholding absent such a failure to comply, nor does it make the withholding unchallengeable. Second, as noted by Judge Kozinski, a subcontractor whose payments are withheld can bring an action against the awarding body under Cal. Labor Code § 1730-1733 under a theory of equitable subrogation, by operation of law and without a formal assignment. Lastly, a subcontractor without an assignment has an unconditional statutory right, under the California Civil Code, to file a "stop notice" with the awarding body, setting forth the amount owed by the public works prime contractor for work performed under the subcontract. (Cal. Civil Code § 3103, 3181, 3184.) The subcontractor may file "an action against the [prime] contractor and the public entity to enforce payment of the claim stated in the stop notice." (Cal. Civil Code § 3210.) Thus, the majority's finding that "the *Labor Code* does not grant subcontractors the right to any type of hearing to

contest a withholding" (A-15, italics added), even if correct, misses the fact that the *Civil Code* already provides subcontractors with such a remedy. The effectiveness of the stop notice as a remedy is well established under California law. *See, e.g., United States Fidelity & Guaranty Co. v. Oak Grove Union School Dist.*, 205 Cal.App.2d 226, 22 Cal.Rptr. 907 (1962) [the filing of a stop notice imposes a trust obligation on the public agency in favor of the claimant]; *Stanislaus Pump, Machinery & Construction Corp. v. City of Modesto,* 200 Cal.App.3d 1442, 246 Cal.Rptr. 601 (1988) [public entity has an absolute statutory duty to pay the valid amounts to stop notice claimants and to no one else].

The Ninth Circuit panel majority's most critical failing, however, is not its misreading of California law, but rather, its holding that even had G & G obtained assignments to file breach of contract lawsuits against the awarding bodies, that would not constitute adequate due process. (A-23) In this regard too, this decision stands in conflict with the law of other circuits. In *Brown v. Brienen, supra,* 722 F.2d 360, the Seventh Circuit held that even if a county's denial of time off for overtime worked by county employees could be said to implicate any property rights (a proposition the court found extremely doubtful), the availability of a post-deprivation state court action for breach of contract which could make the employees whole for any losses provided an adequate remedy that satisfied the requirements of due process. Likewise, in *Reich v. Beharry, supra,* 883 F.2d 239, 242-243, the Third Circuit, after expressing "considerable doubt" that a private attorney had a protectable property interest in the payment of amounts allegedly due as a result of work he had performed under a contract with a county, held that the availability of a breach of contract remedy in state court under which he could be made whole for the

unpaid fees provides "all the process that was constitutionally due."

The panel majority, while acknowledging that the state has an overwhelming interest in ensuring that contract funds will be available to pay amounts believed to be due to employees for wage underpayments, and that this interest is sufficiently important to justify the withholding of funds without a pre-deprivation hearing, nonetheless holds that an administrative hearing must be afforded promptly following the withholding, and that a post-deprivation lawsuit fails to provide the requisite due process.

The adequacy of post-deprivation state court remedies is an issue that has come before this Court on a number of occasions. This case presents the Court with an opportunity, for the first time, to address this issue in the context of an alleged deprivation of property founded upon a commercial contract with a state entity.[11]

In *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), the Court recognized that under certain circumstances, "postdeprivation remedies made available by the State can satisfy the Due Process Clause." 451 U.S. at 538, 101 S.Ct. at 1914. The Court reasoned that, "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the

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[11] An academic commentator's detailed examination of this issue concluded that "[c]ontractual interests, though protected by the Constitution, receive adequate protection in state court post-deprivation proceedings." Kreynin, *Breach of Contract as a Due Process Violation: Can the Constitution Be a Font of Contract Law?*, 90 Colum. L. Rev. 1098, 1122 (1990).

State's action at some time after the initial taking, can satisfy the requirements of procedural due process." 451 U.S. at 539, 101 S.Ct. at 1915. The Court held that although an action under section 1983 might provide more relief than a state tort action, the available state remedies "could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process." 451 U.S. at 544, 101 S.Ct. at 1917.

In *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), like *Parratt*, the Court found the availability of a post-deprivation state tort action that could provide compensation for the loss constitutes sufficient due process with respect to prisoners' claims of wrongful destruction of property by prison officers. To be sure, part of the rationale behind these decisions was that the alleged destruction of the property did not stem from the proper implementation of an established state procedure, but rather, from the unauthorized and unanticipated acts of state employees.

But the fact that the challenged state action is authorized by state law and implemented in an anticipated way by state employees consistent with established methods does not necessarily mean that a state court post-deprivation remedy is inadequate. For example, in *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), the Court held that state tort remedies provided adequate process for students subjected to corporal punishment in school. Having concluded that a pre-disciplinary administrative hearing was not required, the Court could have insisted on a post-disciplinary hearing. It did not, as a post-disciplinary tort action could adequately compensate the student for the wrongful imposition of discipline.

In cases where the Supreme Court has distinguished *Parratt* and *Hudson*, the available state court remedy could not provide adequate compensation for the deprivation. Thus, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-37, 101 S.Ct. 1148, 1157-58, 71 L.Ed.2d 265 (1982), the Court, after observing that a post-deprivation tort remedy was not capable of making the plaintiff whole, held that the availability of such a remedy did not satisfy the requirements of due process. The deprivation consisted of a state administrative agency's wrongful failure to proceed on a claim that was filed, within the agency's jurisdiction, against an employer for having discharged the claimant in violation of the state's anti-discrimination laws. The Court noted that reinstatement was not an available remedy under a tort claim, and thus, even a successful lawsuit could not provide him with the relief that would have been available but for the state's deprivation of his right to proceed on his anti-discrimination claim.

Likewise, in *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), a sharply divided Court held that allegations in a mental patient's complaint, that employees of a state mental treatment facility admitted him to the facility as a voluntary patient without taking any steps to ascertain whether he was mentally competent to sign admission forms, were sufficient to state a section 1983 claim, notwithstanding the availability of post-deprivation tort remedies. In ascertaining the adequacy of the state's post-deprivation tort remedies, the Court applied the familiar tripartite test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), weighing the following factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if

> any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Zinermon v. Burch, supra,* 494 U.S. at 127, 110 S.Ct. at 984.

Not surprisingly, in applying this test to a situation where the deprivation consisted of an extremely lengthy stay in a mental institution, the Court concluded that the state's post-deprivation tort remedy was inadequate.

In contrast to plaintiffs' injuries in *Logan* and *Zinermon*, the nature of the deprivation allegedly suffered by G & G is wholly compensable through the state's post-deprivation breach of contract remedy. Having concluded that a pre-deprivation hearing is not required under the *Mathews* test, the Ninth Circuit nonetheless insists upon a post-deprivation administrative hearing, despite the fact that such a process offers no remedy beyond what could be attained by a state court breach of contract action. Here, as in *Parratt*, the necessity for quick action is coupled with the availability of a "meaningful means" by which to assess the propriety of the state's challenged action. The statutory remedy offers a streamlined process for obtaining a judicial determination of the dispute. As set out at California Labor Code § 1733, an action is "limited to the recovery of the wages and penalties withheld," and "no other issues shall be presented to the court." Thus, the awarding body is precluded from raising counterclaims concerning any other alleged failure of performance. It is a one issue case that may be brought "without the permission of the state or other authority." (Cal. Labor Code § 1733.) And although there is no reason to believe (and no evidence or even allegation in the record) that a subcontractor without a formal assignment from its prime contractor has ever been prohibited from

pursuing an action under California Labor Code §§ 1730-1733, the availability of the Civil Code stop notice procedures provide *guaranteed* access to court for every such subcontractor seeking to pursue a breach of contract claim.

The Ninth Circuit's refusal to follow the holdings of those other circuits that have concluded that a state court breach of contract action provides a sufficient remedy, and all the process that is due to a contractor challenging the state's failure to make payments allegedly owed under a commercial contract, will result in an enormous burden to states, counties, cities, and all other public agencies that award contracts. Sadly, this burden on the federalist value of allowing states to choose between an administrative or judicial remedy is unnecessary, as such administrative hearings will provide nothing to contractors and subcontractors beyond what they can already obtain through existing state court remedies.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G & G FIRE SPRINKLERS, INC.,

Plaintiff-Appellee,

v.

VICTORIA L. BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., Director; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her capacity as Deputy Labor Commissioner of the State of California,

Defendants-Appellants.

No. 95-56639

D.C. No.
CV-95-04839-MLR

ORDER AND
AMENDED
OPINION

G & G FIRE SPRINKLERS, INC.,

Plaintiff-Appellee,

v.

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Defendants-Appellants.

No. 96-55194

D.C. No. CV-95-04839-R

Appeals from the United States District Court
for the Central District of California
Manuel L. Real, Chief District Judge, Presiding

No. 95-56639
Argued and Submitted
May 7, 1996 – Pasadena, California

No. 96-55194
Submitted August 27, 1997*
Pasadena, California

Filed February 3, 1998
Amended September 10, 1998

Before: Stephen Reinhardt, Alex Kozinski and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins; Dissent by Judge Kozinski

COUNSEL

Thomas S. Kerrigan, State of California Department of Industrial Relations, Los Angeles, California for the defendants-appellants.

Stephen A. Seideman, Levin, Stein, Chyten & Schneider, Los Angeles, California, for the plaintiff-appellee in No. 95-56639.

Thomas J. McDermott and Harvey Rochman, Manatt, Phelps & Phillips, Los Angeles, California, for the plaintiff-appellee in No. 96-55194.

William P. Gemmill, Gascou, Gemmill & Thornton, Los Angeles, California, for the plaintiff-appellee on rehearing.

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*The panel finds this case appropriate for submission without argument pursuant to Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Scott A. Kronland, Altshuler, Berzon, Nussbaum, Berzon & Rubin, San Francisco, California, for the amici curiae on rehearing.

ORDER

The Opinion filed on February 3, 1998, and appearing at 136 F.3d 587 (9th Cir. 1998), is amended as follows:

(1) Page 591, second column – the counsel listing is revised as follows:

Thomas S. Kerrigan, State of California Department of Industrial Relations, Los Angeles, California for the defendants-appellants.

Stephen A. Seideman, Levin, Stein, Chyten & Schneider, Los Angeles, California, for the plaintiff-appellee in No. 95-56639.

Thomas J. McDermott and Harvey Rochman, Manatt, Phelps & Phillips, Los Angeles, California, for the plaintiff-appellee in No. 96-55194.

William P. Gemmill, Gascou, Gemmill & Thornton, Los Angeles, California, for the plaintiff-appellee on rehearing.

Scott A. Kronland, Altshuler, Berzon, Nussbaum, Berzon & Rubin, San Francisco, California, for the amici curiae on rehearing.

(2) Page 596, first column, lines 29-31 – revise sentence to read "This case thus involves a direct constitutional challenge to the state's regulatory power as embodied in these statutes, not a mere contractual dispute."

(3) Page 597, second column, between the first full paragraph and the second full paragraph – insert:

> Here, we have no doubt that the state's interest in ensuring the payment of prevailing wages is sufficiently "important," *see Mallen*, 486 U.S. at 240, to justify the withholding of funds pending the outcome of whatever kind of hearing may be afforded. Whether a hearing is before or after the giving of notice or the actual withholding is a matter for the state to determine on the basis of the practical considerations involved. *See, e.g., Gilbert v. Homar*, 117 S. Ct. 1807, 1812 (1997) (citing *Morissey v. Brewer*, 408 U.S. 471, 481 (1972)).

(4) Page 597, second column, second full paragraph, line 1 – insert "however," between "case," and "subcontractors"

(5) Page 598, first column, first paragraph – delete paragraph beginning "What specific type of process" and ending "payments and assessing penalties.10" and substitute in its place:

> Although the decision as to which specific type of hearing will be afforded subcontractors may depend upon the factual circumstances, the state must, upon determining that a subcontractor has failed to pay prevailing wages, provide the contractor with a reasonably prompt hearing of some sort.[10] Pending the outcome of such a hearing, the state may withhold payments and penalty funds.[11]

The corresponding footnotes are as follows:

> [10] The question of when a post-deprivation hearing is adequate is separate from the question of what constitutes a sufficient post-deprivation procedure. The Supreme Court has made it clear that no single model is required in all cases, but that the nature of the deprivation and the other underlying circumstances dictate how much process is due. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978); *Goss v. Lopez*, 419 U.S. 565, 579 (1975)).
>
> [11] Contrary to the state's concerns, our decision today does not affect the validity of the Davis-Bacon Act, 40 U.S.C. §§ 276a *et seq.*, upon which the California law was patterned, because the Davis-Bacon Act provides for an extensive hearing and appeal structure through its implementing regulations. Within 30 days after a withholding, either the prime contractor or the subcontractor may request an administrative hearing to review the findings of the Administrator of the Wage and Hour Division of the Department of Labor. 29 C.F.R. § 5.11. The findings and rulings of the administrator may be appealed to an administrative law judge ("ALJ"), whose decision may be appealed to the Wage Appeals Board. *Id.* Ultimately, the Board's decision may be appealed to the federal court. 5 U.S.C. § 704.

(6) Page 598, footnote 9, second paragraph – delete paragraph beginning "Moreover, even if *Parratt* and *Hudson* were" and ending "have no such independent right" and substitute in its place:

> Moreover, we doubt the viability of a subcontractor's hypothetical suit against a prime contractor based on theories of breach of the covenant of good faith and fair dealing or equitable subrogation. The state and amici curiae have been unable to cite a single California case utilizing either theory in this context. The prime contractor could easily defeat any breach of covenant suit by demonstrating that its withholding of payment was authorized by law. *See* § 1729. And the facts of this case clearly do not meet the traditional elements of equitable subrogation. *See Caito v. United California Bank*, 576 P.2d 466, 471 (Cal. 1978).

OPINION

HAWKINS, Circuit Judge:

This case requires us to decide whether certain California Labor Code provisions, authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirements, violate the Due Process Clause of the Fourteenth Amendment because no notice or hearing is required before such adverse action is taken. Specifically, Victoria L. Bradshaw, Labor Commissioner of the State of California, and others appeal the district court's order granting summary judgment in favor of G & G Fire Sprinklers, Inc. ("G & G"), the public works subcontractor here, and permanently enjoining Bradshaw from enforcing California Labor Code §§ 1727, 1730-33, 1775, 1776(g) and 1813 against G & G for alleged violations of California prevailing wage laws. We hold that G & G has standing to maintain this action and that due process requires either a pre- or post-

deprivation hearing, but that the district court's injunction should be narrowed to apply only until such time as the state may adopt by regulation or otherwise appropriate procedures affording such hearings.

I. Facts

A. *The Parties*

Appellee G & G is a fire protection company that installs fire sprinkler systems. G & G has performed numerous public works projects as a contractor or subcontractor. Appellants are the California Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, and officials thereof (collectively "the state").

B. *The California Labor Code*

The California Labor Code requires contractors and subcontractors on public works projects to pay a state-determined prevailing wage to all their workers. Cal. Lab. Code § 1771. To enforce this requirement, the body awarding the contract ("the awarding body") is allowed to withhold funds from a prime contractor should it determine that the contractor or one of its subcontractors has violated the prevailing wage law. § 1727. The state is authorized to withhold an amount equal to the total amount that all the workers have been underpaid, as well as up to $50 per day, per worker in fines for each instance in which the contractor fails to pay the prevailing wage. § 1775. A withholding order can only be issued after a full investigation by DLSE or the awarding body, unless

the withholding is from the final payment to be made to the prime contractor. § 1727. If the violator is a subcontractor, the prime contractor is authorized to withhold an equivalent amount from its payments to the subcontractor. § 1729. All of these provisions must be incorporated into all public works contracts. Cal. Admin. Code, Title 8, § 16430.

A notice to withhold to an awarding body is a standard procedure utilized by DLSE, but no notice or hearing is required prior to its issuance. DLSE is not required to produce any evidence of a violation of the law, no specific standard is applied in determining whether to issue a notice to withhold, and no procedure exists to guard against the issuance of improper or excessive notices to withhold. Moreover, while DLSE has no formal procedures for conducting investigations, as a general rule, information from a witness/informant must be verified with an independent source. In addition, recommendations to withhold must be reviewed by a supervisor.

The exclusive remedy after withholding is a lawsuit by the prime contractor against the awarding body for recovery of the money withheld. §§ 1730-33. Such a suit must be filed within 90 days of the withholding, and the contractor bears the burden of establishing that there was no violation. § 1733. DLSE may defend the lawsuit upon request by the awarding body. *Id.* Subcontractors are not given the right to bring suit, although a prime contractor is allowed to assign its right to sue. *Id.* If a suit is not brought within 90 days, the state disburses the withheld funds to the underpaid workers; if a suit is brought within this period, then the money is held in escrow until its resolution. § 1731.

C. *The Dispute*

This case arose when DLSE issued three withholding notices against G & G for a total of at least $120,000. The notices were for three separate projects on which G & G had served as a subcontractor.[1] The awarding bodies for each of the projects have withheld money from the prime contractors, who in turn have withheld payment from G & G. No evidence in the record explains in detail the basis for the state's decision to withhold funds from G & G.

The issuance of the notices to withhold has a substantial detrimental effect on G & G's ability to do business, as their effect is to reduce, or cut off, payments for work performed and to damage G & G's reputation in the industry. Inasmuch as G & G intends to perform further public works projects in the future, the issuance of additional improper notices to withhold also could impair G & G's cash flow and ability to do business.

G & G filed this action for declaratory and injunctive relief, claiming that the issuance of the notices to withhold without a prior hearing constitutes a deprivation of property without due process of law in violation of the Fourteenth Amendment. The state responded with a motion to dismiss, and G & G later filed a motion for summary judgment. The district court granted G & G's motion for summary judgment and denied the state's motion to dismiss. The district court's judgment declares

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[1] Withholding notices had also been issued on projects on which G & G had served as the prime contractor, but those notices were withdrawn before this suit ensued.

sections 1727, 1730-33, 1775, 1776(g) and 1813 of the California Labor Code and the state's practices thereunder unconstitutional and enjoins the state from enforcing these sections against G & G.

II. Standing

We first address whether G & G has standing to maintain this action.[2] The state argues G & G does not have standing because subcontractors lack privity of contract with the state under the Labor Code and because the state withheld monies from the prime contractors, not G & G, thus precluding any direct causal connection between G & G's alleged injury and the state's conduct.

Standing is a question of law that we review de novo. *Sahni v. American Diversified Partners*, 83 F.3d 1054, 1056 (9th Cir. 1996). To establish standing, a federal plaintiff must show (1) an injury in fact; (2) a causal connection

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[2] We note at the outset that whether a party has standing is a separate question from whether a party has an interest protected by the Due Process Clause – here, a property interest. "Standing to bring a state court claim of deprivation of property rights does not establish a protected property interest." *Kim Constr. Co. v. Board of Trustees*, 14 F.3d 1243, 1249 (7th Cir. 1994). Moreover, that a party has no constitutionally protected property interest under a statute does not mean that it has no standing to bring a claim under that statute. *See id.*

Accordingly, cases such as *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980), and *San Bernardino Physicians' Servs. Med. Group, Inc. v. County of San Bernardino*, 825 F.2d 1404 (9th Cir. 1987), which the state cites to argue that G & G has no standing, are inapposite because they address whether parties have protectible property interests, not standing.

between the injury and the conduct complained of; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

To establish injury in fact, a plaintiff must demonstrate that the injury is "concrete and particularized" and that it is "actual or imminent, not conjectural or hypothetical." *Id.* at 560. The injury here is both concrete and actual. As a result of the state's withholding procedures, G & G has not been paid approximately $120,000, to which it claims it is entitled. G & G meets the first requirement for standing.

A plaintiff must also show that the injury "fairly can be traced to the challenged action of the defendant" and that it does not result "from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The Supreme Court detailed the methodology to be followed in determining causation in a case of this type:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of the facts that must be averred (at the summary judgment stage) . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment . . . will redress it. When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability

> ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction . . . it becomes the burden of the plaintiff to adduce facts showing that those choices [of the third party] have been or will be made in such manner as to produce causation and permit redressability of injury.

Lujan, 504 U.S. at 561-62 (emphasis in original).

The state contends that G & G cannot establish causation because this case involves the state's regulation of a third party, the prime contractors, whose own independent choices are an intervening cause of G & G's injury. Specifically, the state cites California Labor Code § 1729, which states that "[i]t shall be *lawful* for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him" (emphasis added), in support of its argument that the prime contractors were not required to withhold money from G & G and that their decision to do so was the true cause of G & G's injury.

This argument elevates form over substance. The state's action here is targeted at G & G; the prime contractors' only role in the dispute is that of a conduit, not some third party whose independent choices caused G & G's injury. The state investigated G & G's conduct, not the prime contractors', and the withholding notices explicitly named G & G as the violator of the California Labor Code. G & G was clearly the "object of the action" as the Supreme Court used the term. As such, the state's conduct is the cause of G & G's injury: the money would not

have been withheld but for the state's actions.[3] That was the intended result of the state's action, in accordance with the overarching purpose of its regulatory scheme to ensure that prime contractors and subcontractors pay their workers the state-determined prevailing wage.

Even if we somehow assume that G & G is not itself the object of the action, but is indirectly affected by the state's regulation of the prime contractors, our conclusion would be the same. That the harm to G & G may have resulted indirectly does not in itself preclude standing. As the Supreme Court stated in *Warth v. Seldin*, 422 U.S. at 505:

> When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.

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[3] This case differs from those in which the Supreme Court has found the requisite "but for" causation lacking. *See, e.g., Asarco, Inc. v. Kadish*, 490 U.S. 605 (1989) (individual taxpayers and teachers' organization lacked standing to challenge Arizona land management statute when only alleged injuries were increased taxes and reduced school funding because of impossibility of showing statute had direct causal impact on taxes or school funding); *Simon*, 426 U.S. at 26 (plaintiffs lacked standing to sue due to inability to establish causal relationship between IRS ruling and hospitals' decisions not to provide treatment); *Warth v. Seldin*, 422 U.S. 490 (1975) (plaintiffs asserting inability to find homes in city based on exclusionary zoning practices failed to establish causation).

Furthermore, G & G can show that the prime contractors' (third party) choices "have been or will be made in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. Here, the prime contractors have withheld payment from G & G, completing the causal link between G & G's injury and the state's action and permitting redressability. Accordingly, G & G's injury can be directly traced to the state's conduct and the second requirement for standing is also satisfied.

To meet the third requirement for standing, a plaintiff must show that his injury will be redressed if he prevails in his legal action. In this case, G & G's injury will be redressed by this suit because if G & G prevails, the withheld money will be released to the prime contractors, who will be obligated by contract to pay it to G & G.

That G & G as a subcontractor lacks privity of contract with the state only bolsters our conclusion. Under California's Labor Code, subcontractors cannot sue the state for withholding funds; only prime contractors can. A subcontractor theoretically could sue the prime contractor, but the latter has a defense of withholding the funds pursuant to state law. In addition, the Labor Code does not grant subcontractors the right to any type of hearing to contest a withholding. Therefore, if a prime contractor chooses not to contest a withholding or to assign its rights to sue to the subcontractor, the subcontractor is left holding a quite empty bag.[4]

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[4] The state cites *Lloyd v. Stewart & Nuss, Inc.*, 327 F.2d 642, 645-46 (9th Cir. 1964), for the proposition that a subcontractor has no property right to funds withheld by an awarding body

G & G has standing to maintain this suit.

III. Due Process Claim

A due process claim has two elements: (1) a deprivation of a protectible interest, and (2) denial of adequate procedural protections. *See Goldberg v. Kelly*, 397 U.S. 254 (1970). We consider each of these elements in turn.

A. *Protectible Interest*

To determine whether G & G has suffered a deprivation of a protectible interest, we must evaluate (1) what type of interest has been deprived, and (2) whether that

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and hence has no standing to challenge such a withholding. We reject this argument for several reasons.

First, *Lloyd* is a bankruptcy case holding that amounts withheld from a prime contractor by the state upon request of a trucking service doing work for a subcontractor did not constitute property owned or possessed by the debtor subcontractor and hence the bankruptcy court had no summary jurisdiction over the property. The case does not even involve constitutional issues, let alone due process concerns, and it never discusses standing. Second, even if we were to deem *Lloyd* remotely relevant to this case, its decision that the subcontractor debtor had no property right in the debt owed to the prime contractor by the state sheds no light on whether a subcontractor has a protectible property interest in wages withheld from it pursuant to state law. In fact, *Lloyd* acknowledges that the subcontractor and the trucking service "both possessed the right to claim against the fund, but only in the event they were not paid by their respective principal obligors." *Id.* at 646. Here, G & G was not paid by its respective principal obligor, the prime contractor, and it is asking for an opportunity to contest that deprivation.

interest is protected by the Due Process Clause. *Board of Regents of State Colleges v. Roth*, 408 U.S. 569-70 (1972). G & G's interest arises from its public works contract; it has a property interest in being paid in full for the construction work it has completed. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (holding that Wisconsin's garnishment procedure allowing wages to be frozen upon request of creditor's lawyer constituted "obvious" deprivation of property). The state's withholding of over $120,000 has deprived G & G of its interest in full payment for services rendered.

The state quite properly notes, however, that not all property interests are protected by the Due Process Clause. While both federal and California law recognize that a contract with the state can create a constitutionally protected property interest, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Walker v. Northern San Diego County Hosp. Dist.*, 185 Cal. Rptr. 617, 620 (1982), not all public contracts give rise to a protectible due process interest. *See San Bernardino Physicians' Servs. Med. Group, Inc.*, 825 F.2d at 1408. Indeed, because any breach of contract claim against the state logically can be construed as a due process claim, " 'we must bear in mind that the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts.' " *Id.* (quoting *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983)).

> Even though every contract may confer some legal rights under state law, that fact alone need not place all contracts within federal due process protection. Although the underlying substantive interest is created by an independent

> source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.

Id. at 1408-09 (internal quotations omitted).

Drawing on these principles, the state asserts that because the withholding procedure at issue is contained in G & G's contract, this case is nothing more than a contractual dispute that does not rise to the level of a constitutional claim. Moreover, the state argues that construing this case to present a constitutional claim would result in the "federalization" of state contract law by giving G & G and all others who contract with the state an opportunity to have their grievances reviewed in federal court when they should be confined to their contractually bargained-for remedies under state law. This argument, however, misses the mark. Unlike the cases cited by the state, this case does not involve a breach of contract claim or a challenge to the contract itself.[5] G & G

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[5] All the cases cited by the state to support its argument that G & G's interest is not constitutionally protected involve due process claims arising from an alleged breach of contract. *See, e.g., Unger v. National Residents Matching Program*, 928 F.2d 1392, 1399 (3d Cir. 1991) (termination of residency program after plaintiff's acceptance into program failed to implicate due process rights because contract with university hospital did not confer protected status and did not include provision of for-cause termination only); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 968-69 (2d Cir. 1988) (contractor alleging state breached contract by withholding funds pending result of criminal investigation failed to establish due process claim because neither contract nor state law contained for-cause termination provision or right to prompt payment); *San*

concedes that the express terms of the contract grant the state the authority to withhold funds for wage violations; the withholding is not a breach of contract.[6] Instead, G & G challenges the constitutionality of several provisions of the California Labor Code as violative of its federal due process rights.[7] Those provisions, incorporated by state law into all public works contracts, authorize the state to withhold payment of money owed to contractors or subcontractors for alleged violations of the state prevailing wage law. This case thus involves a direct constitutional challenge to the state's regulatory power as embodied in these statutes, not a mere contractual dispute.

The state, relying on *O'Bannon*, 447 U.S. at 773, also contends that G & G's property interest is not protectible because this case involves the indirect effects of state action. In *O'Bannon*, the Supreme Court reiterated the principle that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects

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Bernardino Physicians' Servs. Med. Group, Inc., 825 F.2d at 1406 (physicians' group's challenge to termination of service contract with state did not implicate due process interest because status of employees depended entirely upon their contracts with group, not upon contracts between group and state).

[6] G & G points out that a prime contractor has none of the usual breach of contract remedies. It may not declare a material breach by the awarding body for withholding payments and it may not rescind the contract. The prime contractor must continue to perform, to pay for labor and materials, even if payments have been cut off. The exclusive remedy is a lawsuit. Cal. Labor Code §§ 1731-33.

[7] G & G's complaint seeks declaratory relief from the "facial unconstitutionality of state laws."

of governmental action." 447 U.S. at 789. Specifically, the Court held that residents of a nursing home that had its license revoked did not have a right to a hearing because the revocation "did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." *Id.* at 790. It further stated, "[T]he fact that the decertification of a home may lead to severe hardship for some of its elderly residents does not turn the decertification into a governmental decision to impose that harm." *Id.* at 789. In a footnote, however, the Court expressly noted:

> We of course need not and do not hold that a person may never have a right to a hearing before his interests may be indirectly affected by government action. Conceivably, for example, if the Government were acting against one person for the purpose of punishing or restraining another, the indirectly affected individual might have a constitutional right to some sort of hearing. But in this case the Government is enforcing its regulations against the home for the benefit of the patients as a whole and the home itself has a strong financial incentive to contest its enforcement decision; under these circumstances the parties suffering an indirect adverse effect clearly have no constitutional right to participate in the enforcement proceedings.

Id. at n.22.

The state's reliance on *O'Bannon* is misplaced.[8] Unlike the nursing home residents in that case, G & G is

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[8] The other cases cited by the state are similarly inapposite. *See Castaneda v. United States Dept. of Agric.*, 807 F.2d 1478 (9th Cir. 1987) (employee of convenience store who was fired after

the target of the state's action here. Hence there is no "indirect" governmental action despite the presence of the prime contractors in the chain of causation. Even if we were to accept the state's contention that its withholding of funds constitutes indirect action, such action would fall within the category expressly left open by the *O'Bannon* Court – action taken by the government against one party for the purpose of punishing or restraining another. Either way, we hold that G & G has suffered a deprivation of a protectible property interest as a result of the state's action.

B. *Process Due*

We now examine whether the state accorded G & G due process when it effected this deprivation. As a general rule, the Due Process Clause requires that individuals receive notice and a meaningful opportunity to be heard *before* the government deprives them of property. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). Twenty five years ago, the Supreme Court announced an exception to this rule for "extraordinary situations where some valid governmental interest is at stake." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971)). More

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store was disqualified from food stamp program did not have right to hearing even though employee's fraudulent conduct was cause of termination); *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *aff'd*, 465 U.S. 555 (1984) (students of college that refused to comply with requirements of federal student aid program did not have right to hearing before college's eligibility to receive student aid was revoked).

recently, the Court has refined the exception: "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988). Over the years, the Court has broadened this exception considerably, frequently holding a post-deprivation hearing to be sufficient. *Compare Board of Regents*, 408 U.S. at 570 n.7 (describing use of exception as "rare"), *with e.g., Barry v. Barchi*, 443 U.S. 55 (1979) (holding that state's interest in preserving integrity of sport of horse racing justifies lack of pre-deprivation hearing), *and Mallen*, 486 U.S. 230 (holding that state's interest in maintaining public confidence in bank management justifies post-deprivation hearing for removal of bank manager).

Where extraordinary circumstances justify dispensing with a pre-deprivation hearing, however, a prompt post-deprivation hearing must be provided. *See Mallen*, 486 U.S. at 242. In determining whether a post-deprivation hearing procedure is reasonably prompt, a court should "examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Id.*

Here, we have no doubt that the state's interest in ensuring the payment of prevailing wages is sufficiently "important," *see Mallen*, 486 U.S. at 240, to justify the withholding of funds pending the outcome of whatever

kind of hearing may be afforded. Whether a hearing is before or after the giving of notice or the actual withholding is a matter for the state to determine on the basis of the practical considerations involved. *See, e.g., Gilbert v. Homar*, 117 S. Ct. 1807, 1812 (1997) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

In this case, however, subcontractors like G & G are afforded neither a pre- nor post-deprivation hearing when payments are withheld. Once the state determines that a violation of the prevailing wage law has occurred, it may withhold and disburse money directly to the workers and may impose fines both without providing any hearing at which the subcontractor might challenge the validity of the state's finding. Accordingly, subcontractors have no opportunity to be heard at a meaningful time in a meaningful manner. *See Fuentes*, 407 U.S. at 80. This scheme violates the Due Process Clause of the Fourteenth Amendment.[9]

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[9] Cal. Lab. Code §§ 1730-33. The state's argument that due process is satisfied because an aggrieved party may bring a suit on the contract is unavailing. The state relies on *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986), and *Hudson v. Palmer*, 468 U.S. 517 (1984), which held that in certain circumstances, a post-deprivation remedy under state law may fulfill the requirements of due process. We have stated, however, that "[w]e apply *Parratt* and *Hudson* only when the state administrative machinery did not and could not have learned of the deprivation until after it occurred, not when state officials acted pursuant to state policy and followed state procedures they believed were proper." *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987) (internal quotations omitted). There is no question here, and the state does not contest, that the officials

Although the decision as to what specific type of hearing will be afforded subcontractors may depend upon the factual circumstances, the state must, upon determining that a subcontractor has failed to pay prevailing wages, provide the contractor with a reasonably prompt hearing of some sort.[10] Pending the outcome of such a hearing, the state may withhold payments and penalty funds.[11]

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in this case acted pursuant to state policy and followed state procedures. Thus, Knudson forecloses the state's argument.

Moreover, we doubt the viability of a subcontractor's hypothetical suit against a prime contractor based on theories of breach of the covenant of good faith and fair dealing or equitable subrogation. The state and amici curiae have been unable to cite a single California case utilizing either theory in this context. The prime contractor could easily defeat any breach of covenant suit by demonstrating that its withholding of payment was authorized by law. *See* § 1729. And the facts of this case clearly do not meet the traditional elements of equitable subrogation. *See Caito v. United California Bank*, 576 P.2d 466, 471 (Cal. 1978).

[10] The question of when a post-deprivation hearing is adequate is separate from the question of what constitutes a sufficient post-deprivation procedure. The Supreme Court has made it clear that no single model is required in all cases, but that the nature of the deprivation and the other underlying circumstances dictate how much process is due. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978); *Goss v. Lopez*, 419 U.S. 565, 579 (1975)).

[11] Contrary to the state's concerns, our decision today does not affect the validity of the Davis-Bacon Act, 40 U.S.C. §§ 276a *et seq.*, upon which the California law was patterned, because the Davis-Bacon Act provides for an extensive hearing and appeal structure through its implementing regulations. Within 30 days after a withholding, either the prime contractor or the

IV. Other Issues Raised by the State

The state asserts that G & G's summary judgment motion was premature and hence should have been denied. Federal Rule of Civil Procedure 56(a) allows a motion for summary judgment to be made any time more than twenty days after commencement of the action. G & G's motion complied with this rule and with the notice requirements under Local Rule 7.4.[12] Moreover, the state did not file a Rule 56(f) declaration indicating why it needed discovery and the facts it hoped to discover. Given the state's receipt of adequate notice and an opportunity to respond to the motion, and its failure to file a Rule 56(f) declaration, the di trict court did not err in considering the summary judgment motion.

The state also contends that the individual defendants in this case are entitled to qualified immunity. "Qualified immunity is an affirmative defense to *damage liability*; it does not bar actions for declaratory or injunctive relief." *American Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991) (internal

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subcontractor may request an administrative hearing to review the findings of the Administrator of the Wage and Hour Division of the Department of Labor. 29 C.F.R. § 5.11. The findings and rulings of the administrator may be appealed to an administrative law judge ("ALJ"), whose decision may be appealed to the Wage Appeals Board. *Id.* Ultimately, the Board's decision may be appealed to the federal court. 5 U.S.C. § 704.

[12] G & G points out that it had filed essentially the same motion in a prior case, relying on the same authorities cited here. Thus, the state was aware of G & G's argument and the authorities on which it relied.

quotation omitted) (emphasis added). Therefore, the individual defendants cannot claim qualified immunity as an affirmative defense to this action seeking declaratory and injunctive relief.

In addition, the district court did not err in denying the state's motion to dismiss. The state asserts that defects on the face of the complaint mandated its dismissal, but these alleged defects relate to issues such as standing, whether G & G was deprived of any constitutional right, and the qualified immunity defense. To the extent that we have decided all of these issues in G & G's favor, we affirm the district court's decision.

V. The Injunction

The district court's judgment declared seven separate provisions of the California Labor Code unconstitutional and enjoined the state from enforcing any of those provisions against G & G. The state argues that the injunction is overbroad, and we agree.

When a federal court holds that a constitutional violation has occurred, the nature of the remedy it grants must be determined by the nature and the scope of the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *see also Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established. . . . "). In devising a remedy for constitutional violations by state agencies or officials, the court "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.*

The district court's injunction here was overbroad in two respects. First, by invalidating *all* California Labor Code provisions relating to the withholding procedure, the district court created a remedy beyond what was required to address the constitutional violation – the state's failure to provide subcontractors like G & G a pre- or post-deprivation hearing as required by the Due Process Clause. Declaring the withholding provisions to be unconstitutional *as applied* is sufficient relief, as it allows the state to remedy the violation by adopting regulations providing for a pre- or post-deprivation hearing and to manage its own affairs in a manner consistent with the Constitution. *See Milliken*, 433 U.S. at 280.

Second, the district court issued a permanent injunction prohibiting the state from enforcing the withholding provisions against G & G. The sweeping nature of this relief suggests that even if the state were to provide G & G with an extensive hearing procedure, it still would be enjoined from penalizing G & G for noncompliance and noncooperation, from obtaining the disputed funds from the awarding body, and from disbursing back wages to underpaid workers even if G & G did not contest the withholding. In short, the district court has simply prohibited the state from enforcing the prevailing wage law against G & G. The appropriate course in this case, given all the circumstances, would be to enjoin the state from enforcing the withholding provisions against G & G unless within a reasonable period it chooses to adopt procedures that afford G & G and others either a pre- or post-deprivation hearing, and to specify the time within which the state must do so.

We vacate the district court's injunction and remand for a modification in the manner stated.

VI. Attorney Fees

In a companion appeal that has been submitted on the briefs and consolidated with this case, the state contests the district court's award of attorney fees to G & G following its grant of a permanent injunction in G & G's favor. Specifically, the state asserts that the district court abused its discretion in (1) determining that G & G was the prevailing party under 42 U.S.C. § 1988; (2) awarding attorney fees in light of G & G's alleged failure to satisfy the applicable criteria for such relief; and (3) awarding attorney fees to G & G for work performed in a previous lawsuit alleging identical claims for relief against the same defendants.

A. *Procedural History*

In December 1994, G & G filed a lawsuit entitled *G & G Fire Sprinklers, Inc. v. Juan Garza et al.*, No. CV-94-8542 R ("the *Garza* lawsuit"). G & G's claims in the *Garza* lawsuit were the same as those presented in this case. The *Garza* lawsuit ended in a settlement agreement providing that G & G could refile the lawsuit if the state took further action against G & G, which is precisely what happened. The state's further action – a subsequent notice to withhold – prompted G & G to file the present action.

After the district court's grant of the injunction, the state filed a motion to stay the judgment in this Court,

which was denied by a motions panel. Next, the district court issued an attorney fees award totaling $25,830.28, which is the subject of this appeal. Subsequently, we reconsidered our previous denial of the motion to stay the judgment, granted a stay pending appeal, and set the case for an early hearing on the merits.

B. *Prevailing Party*

The state argues that G & G is not a prevailing party under 42 U.S.C. § 1988 because while it received the relief it requested – an injunction – the staying of that injunction somehow nullified its legal effect or its mandate that the state alter its unlawful conduct. We reject this argument.

In *Farrar v. Hobby*, the Supreme Court held that to be considered a prevailing party, a plaintiff must "obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." 506 U.S. 103, 111 (1992) (citations omitted). "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12.

Here, G & G obtained an injunction from the district court, which materially altered the legal relationship between the parties by prohibiting the state from depriving G & G of property without any hearing. Certainly that change benefitted G & G and it is the prevailing party. *See Herrington v. County of Sonoma*, 883 F.2d 739, 744 (9th Cir. 1989) (injunction, which appellate court upheld, rendered

plaintiffs prevailing parties despite vacatur of damage award); *see also Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 543 (3d Cir. 1994) (plaintiff who has received injunctive relief has prevailed for purposes of section 1988). That a stay was issued after the district court's grant of the injunction does not alter G & G's status as the prevailing party in the district court, as the district court's judgment is a statement of the rights of the parties unless and until that judgment is altered by a higher court. We have decided not to do so.

C. *General Award of Fees*

The state also claims that the district court erroneously awarded attorney fees based solely on the declaration of Stephen A. Seideman ("Seideman declaration"), G & G's attorney in the district court.[13] More specifically, the state argues that the Seideman declaration fails to discuss many of the factors discussed in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), to be considered by a district court in awarding attorney fees. These include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) the contingent or fixed nature of the fee; (7) the limitations imposed by the client or the case; (8) the amount involved and the results obtained;

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[13] The state does not dispute any specific items, such as the services provided or the hourly rate, or the total amount of fees; it simply asserts that G & G's evidence was not sufficient to support an award of fees.

(9) the experience, reputation, and ability; (10) the undesirability of the case; (11) the nature of the professional relationship with the client; and (12) awards in similar cases.

A district court, however, need not discuss each and every factor separately in making its decision. Rather, a strong presumption exists that the lodestar (reasonable number of hours times reasonable hourly rate) represents a reasonable fee, and "many of these factors usually are subsumed" within the lodestar calculation. *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). Thus, G & G only had to prove that its hourly rate was reasonable and that the total number of hours expended was reasonable. *See Dennis v. Chang*, 611 F.2d 1302, 1308 (9th Cir. 1980) (award of attorney fees properly granted where based solely on skill and experience of counsel, rates of compensation "typical" of those charged by attorneys for comparable service, and reasonable amount of time spent).

Nevertheless, we agree with the state that G & G did not satisfy its "burden of producing satisfactory evidence, *in addition to the affidavits of its counsel*, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan*, 815 F.2d at 1263 (emphasis added). The only evidence in the record about the hourly rate is Mr. Seideman's statement in his declaration that "[t]he hourly rates which I billed Plaintiff are equal to or less than those generally billed by attorneys in Los Angeles for similar services," and a similar statement

with regard to the paralegal's hourly rates. These statements constitute an "insufficient basis from which to conclude that the rates requested are 'reasonable.' " *Southerland v. International Longshoremen's and Warehousemen's Union*, 845 F.2d 796, 801 (9th Cir. 1987). Therefore, while G & G certainly is entitled to fees, we remand to the district court the issue of whether the claimed hourly rates are reasonable. On remand, both G & G and the State should be allowed to supplement the record with additional evidence so that the district court can reevaluate the reasonableness of the fees requested.

In addition, we do not find persuasive the state's related argument that the California Division of Labor Standards Enforcement ("DLSE") and the Department of Industrial Relations were not made parties to the present suit until the First Amended Complaint on September 7, 1995 and hence should not be held accountable for any fees incurred prior to that time. We hold that these parties are jointly and severally liable for the fees, given that the work involved aided in the preparation of the case against all the defendants and the case was not one in which the claims against each defendant varied or one defendant was more culpable than another. *See Woods v. Graphic Communications*, 925 F.2d 1195, 1207 (9th Cir. 1991) (defendant liable for fees previously incurred where fees assisted in preparing case against defendant and served as developmental work for case).

D. *Award of Fees for Work Performed in Previous Lawsuit*

The state asserts that the district court should not have allowed G & G to recoup attorney fees from the *Garza* lawsuit given that it did not prevail in that lawsuit. We uphold the district court's decision.

In *Webb v. Board of Educ.*, 471 U.S. 234, 243 (1985), the Supreme Court affirmed a district court's decision to deny attorney fees for time spent pursuing optional administrative remedies, specifically school board proceedings. But the Court noted that the petitioner in that case "made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement," *id.*, suggesting that if that had happened, maybe the result would have been different. We followed the Supreme Court's lead in *Rock Creek Ltd. Partnership v. State Water Resources Control Bd.*, 972 F.2d 274, 279 (9th Cir. 1992), holding that a sponsor of a hydroelectric project was not entitled to attorney fees under §§ 1983 and 1988 for administrative proceedings before FERC. We reasoned that the FERC proceeding was not a condition precedent to plaintiff's entry to federal court, nor was it a part of a continuing federal court action. Because the FERC proceeding was not related or dependent, it could not form the basis for attorney fees. *Id.*

Cases from other circuits have addressed similar fee issues in non-administrative contexts. For example, the Third Circuit held in *Keenan v. City of Philadelphia*, 983

F.2d 459, 474 (3d Cir. 1992), that the district court did not abuse its discretion in including the time spent in labor arbitration in its fee calculation. It based its decision on the following interpretation of *Webb* by the Third Circuit: "[F]or the time spent pursuing optional administrative proceedings properly to be included in the calculation of a reasonable attorney's fee, the work must be 'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561 (1986). In addition, the Eighth Circuit briefly addressed a similar situation in *Perkins v. Cross*, 728 F.2d 1099, 1100 (8th Cir. 1984), an action by picketers against municipal officials for violation of their civil rights. The court held that fees could be awarded for any "time the lawyer spent defending the plaintiffs in the original municipal court proceeding to the extent, if any, that research or investigation done in connection with that proceeding proved directly relevant to the successful prosecution of [their] later civil rights claims." *Id.*

Here, G & G made a showing that the work done in the *Garza* lawsuit was directly related to the present action – the allegations in that suit were identical to those made here. Counsel for G & G stated that the legal research and analysis performed in *Garza* were necessary for this action and accordingly saved him from expending more time on this lawsuit. Thus, unlike the *Rock Creek* case, the prior proceeding here was related to the present action. The two can even be viewed as a continuum of proceedings necessary to achieve the relief finally granted, given that the *Garza* case ended in a settlement stating that if the state took further action, G & G could

refile the lawsuit, which is what happened. Moreover, caselaw reveals no requirement that a party must have prevailed in a prior proceeding to use that as a basis for attorney fees in another action.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART. Costs to Appellee G & G Fire Sprinklers, Inc.

KOZINSKI, Circuit Judge, dissenting.

In *San Bernardino Physicians' Services Medical Group v. County of San Bernardino*, 825 F.2d 1404 (9th Cir. 1987), we held that "[i]t is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim." *Id.* at 1408 (footnote omitted). While we recognized that any contract with the state gives rise to what could be characterized as a property interest, we held that this alone is not a basis for invoking the protections of due process. Rather, the interest in question must fall within a narrow category that might fairly be characterized as a civil right, *see id.* at 1409, a right in public employment being the quintessential example. *See id.* (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972)). *San Bernardino* said that "construction contracts [and] purely material supply contracts" – contracts like the one we have here – do *not* create rights protected by the due process clause. *Id.* at 1410.

The majority abandons *San Bernardino*'s nuanced framework in favor of a categorical approach that turns every right to receive payment on a public works contract into a property right protected by due process: "G & G's interest arises from its public works contract; it has a property interest in being paid in full for the construction

work it has completed." Maj. op. at 10658. The opinion thus conflicts with *San Bernardino*, as well as the opinions of two other circuits. *See Mid-American Waste Sys., Inc. v. City of Gary*, 49 F.3d 286, 291 (7th Cir. 1995); *Walentas v. Lipper*, 862 F.2d 414, 418 (2d Cir. 1988); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 966 (2d Cir. 1988).

It is also very bad policy. The state here is engaged in a commercial activity; it holds no special sway over other parties by virtue of its regulatory powers. In carrying out its project, the state has bargained for the construction to be done according to plan, on schedule, and consistent with health and safety codes; these are ordinary terms just like the ones private parties put into their construction contracts. The state has also bargained for a more exotic term, namely that contractors and subcontractors pay a prevailing wage to their employees. While this differs from what ordinarily appears in private construction contracts, it is not an exercise of the state's regulatory power; rather, it is a term that any private party could equally well put into its contract. If the contractor or subcontractor doesn't like the term, he can refuse to do business with the state.[1]

Here the state determined that G & G did not comply with its prevailing wage obligation, and thus withheld payments. This is no different from a builder's refusal to make progress payments when he discovers (or believes he has discovered) a failure of performance on any other term of a standard construction contract – for example,

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[1] That the prevailing wage term appears in the California Labor Code doesn't matter. No one is forced to comply unless he agrees to do business with the state.

that the plumbing isn't up to code. Withholding payments under such circumstances is the standard remedy. Even if the general contractor were to take the position that the subcontractor could not recover from it because of Cal. Labor Code § 1729, *see* maj. op. at 10663 n.9, the subcontractor would be able to proceed against the state. Labor Code § 1733 provides that suit may be brought by the contractor or the contractor's assignee against the awarding body to recover sums withheld. If the contractor refuses to assign its right to sue for the money withheld to the subcontractor, the subcontractor could sue under the theory of equitable subrogation, which the California Supreme Court has held "is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter." *Caito v. United California Bank*, 20 Cal. 3d 694, 704 (1978) (quoting *Rhine v. Kemmerrer*, 114 Cal. App. 2d 810, 814 (1952)) (internal quotation marks omitted). This is a run-of-the-mill contract dispute just like thousands routinely handled by the state courts without federal intervention.

In lieu of this common sense solution – which also complies with binding precedent – the majority invokes the full panoply of federal due process, including the requirement of a pre-deprivation or prompt (whatever that litigation-inviting term means) post-deprivation hearing, whenever the state wishes to withhold payments for what it believes is defective performance under the contract. While the opinion addresses only the prevailing wage term, its logic carries much farther: If the state discovers any other type of breach – for example, failure

to complete the project on time or to comply with applicable safety codes – it must provide such a hearing as an added price for the standard remedy of withholding payment. This gravely burdens the state's most potent remedy for dealing with recalcitrant contractors and subcontractors. Why the state should be saddled with this yoke when it engages in the purely commercial activity of construction – a burden not suffered by private builders – is beyond me.[2] *San Bernardino* clearly teaches that commercial contract rights must be vindicated in state court using state remedies. By ignoring this teaching the majority creates not just an intra-circuit and inter-circuit conflict but also a wholly unwarranted burden on the thousands of states, counties, cities and special use districts governed by our law. Government is too unwieldy already; there is no justification for adding this heavy layer of red tape. I respectfully dissent.

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[2] We can't always expect the government to act with unbounded compassion, patience and generosity. Indeed, when the government is acting as a commercial entity, taxpayers cajole it to act with all the ferociousness the marketplace demands. Certain limits must always apply: The government cannot, for example, use public works contracts to discriminate on the basis of race or sex. But when the government bargains over the commercial terms of the contract it should enjoy the same ability as private builders to draw up the deal as it likes and seek the best price and the best terms the marketplace allows.

G & G FIRE SPRINKLERS, INC.,

Plaintiff-Appellee,

v.

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Defendants-Appellants.

No. 96-55194
D.C. No.
CV-95-04839-R

Appeals from the United States District Court
for the Central District of Califorina
Manuel L. Real, Chief District Judge, Presiding

No. 95-56639
Agrued and Submitted
May 7, 1996 – Pasadena, California

No. 96-55194
Submitted August 27, 1997*
Pasadena, California

Filed February 3, 1998

Before: Stephen Reinhardt, Alex Kozinski and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins; Dissent by Judge Kozinski

COUNSEL

Thomas S. Kerrigan, State of California Department of Industrial Relations, Los Angeles, California, for the defendants-appellants.

Stephen A. Seideman, Levin, Stein, Chyten & Schneider, Los Angeles, California, for the plaintiff-appellee in No. 95-56639.

Thomas J. McDermott and Harvey Rochman, Manatt, Phelps & Phillips, Los Angeles, California, for the plaintiff-appellee in No. 96-55194.

OPINION

HAWKINS, Circuit Judge:

This case requires us to decide whether certain California Labor Code provisions, authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirements,

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*The panel finds this case appropriate for submission without agrument pursuant to Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

violate the Due Process Clause of the Fourteenth Amendment because no notice or hearing is required before such adverse action is taken. Specifically, Victoria L. Bradshaw, Labor Commissioner of the State of California, and others appeal the district court's order granting summary judgment in favor of G & G Fire Sprinklers, Inc. ("G & G"), the public works subcontractor here, and permanently enjoining Bradshaw from enforcing California Labor Code §§ 1727, 1730-33, 1775, 1776(g) and 1813 against G & G for alleged violations of California prevailing wage laws. We hold that G & G has standing to maintain this action and that due process requires either a pre- or post-deprivation hearing, but that the district court's injunction should be narrowed to apply only until such time as the state may adopt by regulation or otherwise appropriate procedures affording such hearings.

I. Facts

A. *The Parties*

Appellee G & G is a fire protection company that installs fire sprinkler systems. G & G has performed numerous public works projects as a contractor or subcontractor. Appellants are the California Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, and officials thereof (collectively "the state").

B. *The California Labor Code*

The California Labor Code requires contractors and subcontractors on public works projects to pay a state-determined prevailing wage to all their workers. Cal.

Lab. Code § 1771. To enforce this requirement, the body awarding the contract ("the awarding body") is allowed to withhold funds from a prime contractor should it determine that the contractor or one of its subcontractors has violated the prevailing wage law. § 1727. The state is authorized to withhold an amount equal to the total amount that all the workers have been underpaid, as well as up to $50 per day, per worker in fines for each instance in which the contractor fails to pay the prevailing wage. § 1775. A withholding order can only be issued after a full investigation by DLSE or the awarding body, unless the withholding is from the final payment to be made to the prime contractor. § 1727. If the violator is a subcontractor, the prime contractor is authorized to withhold an equivalent amount from its payments to the subcontractor. § 1729. All of these provisions must be incorporated into all public works contracts. Cal. Admin. Code, Title 8, § 16430.

A notice to withhold to an awarding body is a standard procedure utilized by DLSE, but no notice or hearing is required prior to its issuance. DLSE is not required to produce any evidence of a violation of the law, no specific standard is applied in determining whether to issue a notice to withhold, and no procedure exists to guard against the issuance of improper or excessive notices to withhold. Moreover, while DLSE has no formal procedures for conducting investigations, as a general rule, information from a witness/informant must be verified with an independent source. In addition, recommendations to withhold must be reviewed by a supervisor.

The exclusive remedy after withholding is a lawsuit by the prime contractor against the awarding body for

recovery of the money withheld. §§ 1730-33. Such a suit must be filed within 90 days of the withholding, and the contractor bears the burden of establishing that there was no violation. § 1733. DLSE may defend the lawsuit upon request by the awarding body. *Id.* Subcontractors are not given the right to bring suit, although a prime contractor is allowed to assign its right to sue. *Id.* If a suit is not brought within 90 days, the state disburses the withheld funds to the underpaid workers; if a suit is brought within this period, then the money is held in escrow until its resolution. § 1731.

C. *The Dispute*

This case arose when DLSE issued three withholding notices against G & G for a total of at least $120,000. The notices were for three separate projects on which G & G had served as a subcontractor.[1] The awarding bodies for each of the projects have withheld money from the prime contractors, who in turn have withheld payment from G & G. No evidence in the record explains in detail the basis for the state's decision to withhold funds from G & G.

The issuance of the notices to withhold has a substantial detrimental effect on G & G's ability to do business, as their effect is to reduce, or cut off, payments for work performed and to damage G & G's reputation in the industry. Inasmuch as G & G intends to perform further

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[1] Withholding notices had also been issued on projects on which G & G had served as the prime contractor, but those notices were withdrawn before this suit ensued.

public works projects in the future, the issuance of additional improper notices to withhold also could impair G & G's cash flow and ability to do business.

G & G filed this action for declaratory and injunctive relief, claiming that the issuance of the notices to withhold without a prior hearing constitutes a deprivation of property without due process of law in violation of the Fourteenth Amendment. The state responded with a motion to dismiss, and G & G later filed a motion for summary judgment. The district court granted G & G's motion for summary judgment and denied the state's motion to dismiss. The district court's judgment declares sections 1727, 1730-33, 1775, 1776(g) and 1813 of the California Labor Code and the state's practices thereunder unconstitutional and enjoins the state from enforcing these sections against G & G.

II. Standing

We first address whether G & G has standing to maintain this action.[2] The state argues G & G does not

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[2] We note at the outset that whether a party has standing is a separate question from whether a party has an interest protected by the Due Process Clause – here, a property interest. "Standing to bring a state court claim of deprivation of property rights does not establish a protected property interest." *Kim Constr. Co. v. Board of Trustees*, 14 F.3d 1243, 1249 (7th Cir. 1994). Moreover, that a party has no constitutionally protected property interest under a statute does not mean that it has no standing to bring a claim under that statute. *See id.*

[*] Accordingly, cases such as *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980), and *San Bernardino Physicians' Servs. Med. Group, Inc. v. County of San Bernardino*, 825 F.2d 1404 (9th

have standing because subcontractors lack privity of contract with the state under the Labor Code and because the state withheld monies from the prime contractors, not G & G, thus precluding any direct causal connection between G & G's alleged injury and the state's conduct.

Standing is a question of law that we review de novo. *Sahni v. American Diversified Partners*, 83 F.3d 1054, 1056 (9th Cir. 1996). To establish standing, a federal plaintiff must show (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

To establish injury in fact, a plaintiff must demonstrate that the injury is "concrete and particularized" and that it is "actual or imminent, not conjectural or hypothetical." *Id.* at 560. The injury here is both concrete and actual. As a result of the state's withholding procedures, G & G has not been paid approximately $120,000, to which it claims it is entitled. G & G meets the first requirement for standing.

A plaintiff must also show that the injury "fairly can be traced to the challenged action of the defendant" and that it does not result "from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The

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Cir. 1987), which the state cites to argue that G & G has no standing, are inapposite because they address whether parties have protectible property interests, not standing.

Supreme Court detailed the methodology to be followed in determining causation in a case of this type:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of the facts that must be averred (at the summary judgment stage) . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment . . . will redress it. When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction . . . it becomes the burden of the plaintiff to adduce facts showing that those choices [of the third party] have been or will be made in such manner as to produce causation and permit redressability of injury.
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> *Lujan*, 504 U.S. at 561-62 (emphasis in original).

The state contends that G & G cannot establish causation because this case involves the state's regulation of a third party, the prime contractors, whose own independent choices are an intervening cause of G & G's injury. Specifically, the state cites California Labor Code § 1729, which states that "[i]t shall be *lawful* for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him" (emphasis added), in support of its argument that the prime contractors were not required to withhold money

from G & G and that their decision to do so was the true cause of G & G's injury.

This argument elevates form over substance. The state's action here is targeted at G & G; the prime contractors' only role in the dispute is that of a conduit, not some third party whose independent choices caused G & G's injury. The state investigated G & G's conduct, not the prime contractors', and the withholding notices explicitly named G & G as the violator of the California Labor Code. G & G was clearly the "object of the action" as the Supreme Court used the term. As such, the state's conduct is the cause of G & G's injury: the money would not have been withheld but for the state's actions.[3] That was the intended result of the state's action, in accordance with the overarching purpose of its regulatory scheme to ensure that prime contractors and subcontractors pay their workers the state-determined prevailing wage.

Even if we somehow assume that G & G is not itself the object of the action, but is indirectly affected by the state's regulation of the prime contractors, our conclusion

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[3] This case differs from those in which the Supreme Court has found the requisite "but for" causation lacking. *See, e.g., ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989) (individual taxpayers and teachers' organization lacked standing to challenge Arizona land management statute when only alleged injuries were increased taxes and reduced school funding because of impossibility of showing statute had direct causal impact on taxes or school funding); *Simon*, 426 U.S. at 26 (plaintiffs lacked standing to sue due to inability to establish causal relationship between IRS ruling and hospitals' decisions not to provide treatment); *Warth v. Seldin*, 422 U.S. 490 (1975) (plaintiffs asserting inability to find homes in city based on exclusionary zoning practices failed to establish causation).

would be the same. That the harm to G & G may have resulted indirectly does not in itself preclude standing. As the Supreme Court stated in *Warth v. Seldin*, 422 U.S. at 505:

> When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.

Furthermore, G & G can show that the prime contractors' (third party) choices "have been or will be made in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. Here, the prime contractors have withheld payment from G & G, completing the causal link between G & G's injury and the state's action and permitting redressability. Accordingly, G & G's injury can be directly traced to the state's conduct and the second requirement for standing is also satisfied.

To meet the third requirement for standing, a plaintiff must show that his injury will be redressed if he prevails in his legal action. In this case, G & G's injury will be redressed by this suit because if G & G prevails, the withheld money will be released to the prime contractors, who will be obligated by contract to pay it to G & G.

That G & G as a subcontractor lacks privity of contract with the state only bolsters our conclusion. Under California's Labor Code, subcontractors cannot sue the state for withholding funds; only prime contractors can. A subcontractor theoretically could sue the prime contractor, but the latter has a defense of withholding the

funds pursuant to state law. In addition, the Labor Code does not grant subcontractors the right to any type of hearing to contest a withholding. Therefore, if a prime contractor chooses not to contest a withholding or to assign its rights to sue to the subcontractor, the subcontractor is left holding a quite empty bag.[4]

G & G has standing to maintain this suit.

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[4] The state cites *Lloyd v. Stewart & Nuss, Inc.*, 327 F.2d 642, 645-46 (9th Cir. 1964), for the proposition that a subcontractor has no property right to funds withheld by an awarding body and hence has no standing to challenge such a withholding. We reject this argument for several reasons.

First, *Lloyd* is a bankruptcy case holding that amounts withheld from a prime contractor by the state upon request of a trucking service doing work for a subcontractor did not constitute property owned or possessed by the debtor subcontractor and hence the bankruptcy court had no summary jurisdiction over the property. The case does not even involve constitutional issues, let alone due process concerns, and it never discusses standing. Second, even if we were to deem *Lloyd* remotely relevant to this case, its decision that the subcontractor debtor had no property right in the debt owed to the prime contractor by the state sheds no light on whether a subcontractor has a protectible property interest in wages withheld from it pursuant to state law. In fact, *Lloyd* acknowledges that the subcontractor and the trucking service "both possessed the right to claim against the fund, but only in the event they were not paid by their respective principal obligors." *Id.* at 646. Here, G & G was not paid by its respective principal obligor, the prime contractor, and it is asking for an opportunity to contest that deprivation.

III. Due Process Claim

A due process claim has two elements: (1) a deprivation of a protectible interest, and (2) denial of adequate procedural protections. *See Goldberg v. Kelly*, 397 U.S. 254 (1970). We consider each of these elements in turn.

A. *Protectible Interest*

To determine whether G & G has suffered a deprivation of a protectible interest, we must evaluate (1) what type of interest has been deprived, and (2) whether that interest is protected by the Due Process Clause. *Board of Regents of State Colleges v. Roth*, 408 U.S. 569-70 (1972). G & G's interest arises from its public works contract; it has a property interest in being paid in full for the construction work it has completed. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (holding that Wisconsin's garnishment procedure allowing wages to be frozen upon request of creditor's lawyer constituted "obvious" deprivation of property). The state's withholding of over $120,000 has deprived G & G of its interest in full payment for services rendered.

The state quite properly notes, however, that not all property interests are protected by the Due Process Clause. While both federal and California law recognize that a contract with the state can create a constitutionally protected property interest, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Walker v. Northern San Diego County Hosp. Dist.*, 185 Cal.Rptr. 617, 620 (1982), not all public contracts give rise to a protectible due process interest. *See San Bernardino Physicians' Servs. Med. Group, Inc.*, 825 F.2d at 1408. Indeed, because any breach of contract claim

against the state logically can be construed as a due process claim, " 'we must bear in mind that the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts.' " *Id.* (quoting *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983)).

> Even though every contract may confer some legal rights under state law, that fact alone need not place all contracts within federal due process protection. Although the underlying substantive interest is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.

Id. at 1408-09 (internal quotations omitted).

Drawing on these principles, the state asserts that because the withholding procedure at issue is contained in G & G's contract, this case is nothing more than a contractual dispute that does not rise to the level of a constitutional claim. Moreover, the state argues that construing this case to present a constitutional claim would result in the "federalization" of state contract law by giving G & G and all others who contract with the state an opportunity to have their grievances reviewed in federal court when they should be confined to their contractually bargained-for remedies under state law. This argument, however, misses the mark. Unlike the cases cited by the state, this case does not involve a breach of

contract claim or a challenge to the contract itself.[5] G & G concedes that the express terms of the contract grant the state the authority to withhold funds for wage violations; the withholding is not a breach of contract.[6] Instead, G & G challenges the constitutionality of several provisions of the California Labor Code as violative of its

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[5] All the cases cited by the state to support its argument that G & G's interest is not constitutionally protected involve due process claims arising from an alleged breach of contract. *See, e.g., Unger v. National Residents Matching Program*, 928 F.2d 1392, 1399 (3d Cir. 1991) (termination of residency program after plaintiff's acceptance into program failed to implicate due process rights because contract with university hospital did not confer protected status and did not include provision of for-cause termination only); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 968-69 (2d Cir. 1988) (contractor alleging state breached contract by withholding funds pending result of criminal investigation failed to establish due process claim because neither contract nor state law contained for-cause termination provision or right to prompt payment); *San Bernardino Physicians' Servs. Med. Group, Inc.*, 825 F.2d at 1406 (physicians' group's challenge to termination of service contract with state did not implicate due process interest because status of employees depended entirely upon their contracts with group, not upon contracts between group and state).

[6] G & G points out that a prime contractor has none of the usual breach of contract remedies. It may not declare a material breach by the awarding body for withholding payments and it may not rescind the contract. The prime contractor must continue to perform, to pay for labor and materials, even if payments have been cut off. The exclusive remedy is a lawsuit. Cal. Labor Code §§ 1731-33.

federal due process rights.[7] Those provisions, incorporated by state law into all public works contracts, authorize the state to withhold payment of money owed to contractors or subcontractors for alleged violations of the state prevailing wage law. This case thus involves a direct constitutional challenge to these statutes, not a mere contractual dispute.

The state, relying on *O'Bannon*, 447 U.S. at 773, also contends that G & G's property interest is not protectible because this case involves the indirect effects of state action. In *O'Bannon*, the Supreme Court reiterated the principle that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." 447 U.S. at 789. Specifically, the Court held that residents of a nursing home that had its license revoked did not have a right to a hearing because the revocation "did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." *Id.* at 790. It further stated, "[T]he fact that the decertification of a home may lead to severe hardship for some of its elderly residents does not turn the decertification into a governmental decision to impose that harm." *Id.* at 789. In a footnote, however, the Court expressly noted:

> We of course need not and do not hold that a person may never have a right to a hearing before his interests may be indirectly affected by government action. Conceivably, for example, if the Government were acting against one person

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[7] G & G's complaint seeks declaratory relief from the "facial unconstitutionality of state laws."

> for the purpose of punishing or restraining another, the indirectly affected individual might have a constitutional right to some sort of hearing. But in this case the Government is enforcing its regulations against the home for the benefit of the patients as a whole and the home itself has a strong financial incentive to contest its enforcement decision; under these circumstances the parties suffering an indirect adverse effect clearly have no constitutional right to participate in the enforcement proceedings.

Id. at n.22.

The state's reliance on *O'Bannon* is misplaced.[8] Unlike the nursing home residents in that case, G & G is the target of the state's action here. Hence there is no "indirect" governmental action despite the presence of the prime contractors in the chain of causation. Even if we were to accept the state's contention that its withholding of funds constitutes indirect action, such action would fall within the category expressly left open by the *O'Bannon* Court – action taken by the government against one party for the purpose of punishing or restraining another. Either way, we hold that G & G has suffered a

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[8] The other cases cited by the state are similarly inapposite. *See Castaneda v. United States Dept. of Agric.*, 807 F.2d 1478 (9th Cir. 1987) (employee of convenience store who was fired after store was disqualified from food stamp program did not have right to hearing even though employee's fraudulent conduct was cause of termination); *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *aff'd*, 465 U.S. 555 (1984) (students of college that refused to comply with requirements of federal student aid program did not have right to hearing before college's eligibility to receive student aid was revoked).

deprivation of a protectible property interest as a result of the state's action.

B. *Process Due*

We now examine whether the state accorded G & G due process when it effected this deprivation. As a general rule, the Due Process Clause requires that individuals receive notice and a meaningful opportunity to be heard *before* the government deprives them of property. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). Twenty five years ago, the Supreme Court announced an exception to this rule for "extraordinary situations where some valid governmental interest is at stake." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971)). More recently, the Court has refined the exception: "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988). Over the years, the Court has broadened this exception considerably, frequently holding a post-deprivation hearing to be sufficient. *Compare Board of Regents*, 408 U.S. at 570 n.7 (describing use of exception as "rare"), *with e.g., Barry v. Barchi*, 443 U.S. 55 (1979) (holding that state's interest in preserving integrity of sport of horse racing justifies lack of pre-deprivation hearing), *and Mallen*, 486 U.S. 230 (holding that state's interest in maintaining public confidence in bank management justifies post-deprivation hearing for removal of bank manager).

Where extraordinary circumstances justify dispensing with a pre-deprivation hearing, however, a prompt post-deprivation hearing must be provided. *See Mallen*, 486 U.S. at 242. In determining whether a post-deprivation hearing procedure is reasonably prompt, a court should "examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Id.*

In this case, subcontractors like G & G are afforded neither a pre-nor post-deprivation hearing when payments are withheld. Once the state determines that a violation of the prevailing wage law has occurred, it may withhold and disburse money directly to the workers and may impose fines both without providing any hearing at which the subcontractor might challenge the validity of the state's finding. Accordingly, subcontractors have no opportunity to be heard at a meaningful time in a meaningful manner. *See Fuentes*, 407 U.S. at 80. This scheme violates the Due Process Clause of the Fourteenth Amendment.[9]

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[9] Cal. Lab. Code §§ 1730-33. The state's argument that due process is satisfied because an aggrieved party may bring a suit on the contract is unavailing. The state relies on *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986), and *Hudson v. Palmer*, 468 U.S. 517 (1984), which held that in certain circumstances, a post-deprivation remedy under state law may fulfill the requirements of due process. We have stated, however, that "[w]e apply *Parratt* and *Hudson* only when the state

What specific type of process must be afforded subcontractors is for the state to decide. We hold only that the state must provide for either a pre- or prompt post-deprivation hearing when withholding payments and assessing penalties.[10]

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administrative machinery did not and could not have learned of the deprivation until after it occurred, not when state officials acted pursuant to state policy and followed state procedures they believed were proper." *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987) (internal quotations omitted). There is no question here, and the state does not contest, that the officials in this case acted pursuant to state policy and followed state procedures. Thus, Knudson forecloses the state's argument.

Moreover, even if *Parratt* and *Hudson* were applicable, they would not alter our conclusion because only prime contractors are granted the right to bring suit on the contract against the state. Subcontractors may sue only if the prime contractor is willing to assign them its right. Therefore, even if this right to sue could somehow be held to satisfy due process, it would not satisfy due process for the subcontractors who have no such independent right.

[10] Contrary to the state's concerns, our decision today does not affect the validity of the Davis-Bacon Act, 40 U.S.C. §§ 276a *et seq.*, upon which the California law was patterned, because the Davis-Bacon Act provides for an extensive hearing and appeal structure through its implementing regulations. Within 30 days after a withholding, either the prime contractor or the subcontractor may request an administrative hearing to review the findings of the Administrator of the Wage and Hour Division of the Department of Labor. 29 C.F.R. § 5.11. The findings and rulings of the administrator may be appealed to an administrative law judge ("ALJ"), whose decision may be appealed to the Wage Appeals Board. *Id.* Ultimately, the Board's decision may be appealed to the federal court. 5 U.S.C. § 704.

IV. Other Issues Raised by the State

The state asserts that G & G's summary judgment motion was premature and hence should have been denied. Federal Rule of Civil Procedure 56(a) allows a motion for summary judgment to be made any time more than twenty days after commencement of the action. G & G's motion complied with this rule and with the notice requirements under Local Rule 7.4.[11] Moreover, the state did not file a Rule 56(f) declaration indicating why it needed discovery and the facts it hoped to discover. Given the state's receipt of adequate notice and an opportunity to respond to the motion, and its failure to file a Rule 56(f) declaration, the district court did not err in considering the summary judgment motion.

The state also contends that the individual defendants in this case are entitled to qualified immunity. "Qualified immunity is an affirmative defense to *damage liability*; it does not bar actions for declaratory or injunctive relief." *American Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991) (internal quotation omitted) (emphasis added). Therefore, the individual defendants cannot claim qualified immunity as an affirmative defense to this action seeking declaratory and injunctive relief.

In addition, the district court did not err in denying the state's motion to dismiss. The state asserts that

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[11] G & G points out that it had filed essentially the same motion in a prior case, relying on the same authorities cited here. Thus, the state was aware of G & G's argument and the authorities on which it relied.

defects on the face of the complaint mandated its dismissal, but these alleged defects relate to issues such as standing, whether G & G was deprived of any constitutional right, and the qualified immunity defense. To the extent that we have decided all of these issues in G & G's favor, we affirm the district court's decision.

V. The Injunction

The district court's judgment declared seven separate provisions of the California Labor Code unconstitutional and enjoined the state from enforcing any of those provisions against G & G. The state argues that the injunction is overbroad, and we agree.

When a federal court holds that a constitutional violation has occurred, the nature of the remedy it grants must be determined by the nature and the scope of the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *see also Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established. . . . "). In devising a remedy for constitutional violations by state agencies or officials, the court "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.*

The district court's injunction here was overbroad in two respects. First, by invalidating *all* California Labor Code provisions relating to the withholding procedure, the district court created a remedy beyond what was required to address the constitutional violation – the state's failure to provide subcontractors like G & G a pre-

or post-deprivation hearing as required by the Due Process Clause. Declaring the withholding provisions to be unconstitutional *as applied* is sufficient relief, as it allows the state to remedy the violation by adopting regulations providing for a pre- or post-deprivation hearing and to manage its own affairs in a manner consistent with the Constitution. *See Milliken*, 433 U.S. at 280.

Second, the district court issued a permanent injunction prohibiting the state from enforcing the withholding provisions against G & G. The sweeping nature of this relief suggests that even if the state were to provide G & G with an extensive hearing procedure, it still would be enjoined from penalizing G & G for noncompliance and noncooperation, from obtaining the disputed funds from the awarding body, and from disbursing back wages to underpaid workers even if G & G did not contest the withholding. In short, the district court has simply prohibited the state from enforcing the prevailing wage law against G & G. The appropriate course in this case, given all the circumstances, would be to enjoin the state from enforcing the withholding provisions against G & G unless within a reasonable period it chooses to adopt procedures that afford G & G and others either a pre- or post-deprivation hearing, and to specify the time within which the state must do so.

We vacate the district court's injunction and remand for a modification in the manner stated.

VI. Attorney Fees

In a companion appeal that has been submitted on the briefs and consolidated with this case, the state contests the district court's award of attorney fees to G & G following its grant of a permanent injunction in G & G's favor. Specifically, the state asserts that the district court abused its discretion in (1) determining that G & G was the prevailing party under 42 U.S.C. § 1988; (2) awarding attorney fees in light of G & G's alleged failure to satisfy the applicable criteria for such relief; and (3) awarding attorney fees to G & G for work performed in a previous lawsuit alleging identical claims for relief against the same defendants.

A. *Procedural History*

In December 1994, G & G filed a lawsuit entitled *G & G Fire Sprinklers, Inc. v. Juan Garza et al.*, No. CV-94-8542 R ("the *Garza* lawsuit"). G & G's claims in the *Garza* lawsuit were the same as those presented in this case. The *Garza* lawsuit ended in a settlement agreement providing that G & G could refile the lawsuit if the state took further action against G & G, which is precisely what happened. The state's further action – a subsequent notice to withhold – prompted G & G to file the present action.

After the district court's grant of the injunction, the state filed a motion to stay the judgment in this Court, which was denied by a motions panel. Next, the district court issued an attorney fees award totaling $25,830.28, which is the subject of this appeal. Subsequently, we reconsidered our previous denial of the motion to stay

the judgment, granted a stay pending appeal, and set the case for an early hearing on the merits.

B. *Prevailing Party*

The state argues that G & G is not a prevailing party under 42 U.S.C. § 1988 because while it received the relief it requested – an injunction – the staying of that injunction somehow nullified its legal effect or its mandate that the state alter its unlawful conduct. We reject this argument.

In *Farrar v. Hobby*, the Supreme Court held that to be considered a prevailing party, a plaintiff must "obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." 506 U.S. 103, 111 (1992) (citations omitted). "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12.

Here, G & G obtained an injunction from the district court, which materially altered the legal relationship between the parties by prohibiting the state from depriving G & G of property without any hearing. Certainly that change benefitted G & G and it is the prevailing party. *See Herrington v. County of Sonoma*, 883 F.2d 739, 744 (9th Cir. 1989) (injunction, which appellate court upheld, rendered plaintiffs prevailing parties despite vacatur of damage award); *see also Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 543 (3d Cir. 1994) (plaintiff who has received injunctive relief has prevailed for purposes of section

1988). That a stay was issued after the district court's grant of the injunction does not alter G & G's status as the prevailing party in the district court, as the district court's judgment is a statement of the rights of the parties unless and until that judgment is altered by a higher court. We have decided not to do so.

C. *General Award of Fees*

The state also claims that the district court erroneously awarded attorney fees based solely on the declaration of Stephen A. Seideman ("Seideman declaration"), G & G's attorney in the district court.[12] More specifically, the state argues that the Seideman declaration fails to discuss many of the factors discussed in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), to be considered by a district court in awarding attorney fees. These include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) the contingent or fixed nature of the fee; (7) the limitations imposed by the client or the case; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability; (10) the undesirability of the case; (11) the nature of the professional relationship with the client; and (12) awards in similar cases.

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[12] The state does not dispute any specific items, such as the services provided or the hourly rate, or the total amount of fees; it simply asserts that G & G's evidence was not sufficient to support an award of fees.

A district court, however, need not discuss each and every factor separately in making its decision. Rather, a strong presumption exists that the lodestar (reasonable number of hours times reasonable hourly rate) represents a reasonable fee, and "many of these factors usually are subsumed" within the lodestar calculation. *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). Thus, G & G only had to prove that its hourly rate was reasonable and that the total number of hours expended was reasonable. *See Dennis v. Chang*, 611 F.2d 1302, 1308 (9th Cir. 1980) (award of attorney fees properly granted where based solely on skill and experience of counsel, rates of compensation "typical" of those charged by attorneys for comparable service, and reasonable amount of time spent).

Nevertheless, we agree with the state that G & G did not satisfy its "burden of producing satisfactory evidence, *in addition to the affidavits of its counsel*, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan*, 815 F.2d at 1263 (emphasis added). The only evidence in the record about the hourly rate is Mr. Seideman's statement in his declaration that "[t]he hourly rates which I billed Plaintiff are equal to or less than those generally billed by attorneys in Los Angeles for similar services," and a similar statement with regard to the paralegal's hourly rates. These statements constitute an "insufficient basis from which to conclude that the rates requested are 'reasonable.' " *Southerland v. International Longshoremen's and Warehousemen's Union*, 845 F.2d 796, 801 (9th Cir. 1987). Therefore,

while G & G certainly is entitled to fees, we remand to the district court the issue of whether the claimed hourly rates are reasonable. On remand, both G & G and the State should be allowed to supplement the record with additional evidence so that the district court can reevaluate the reasonableness of the fees requested.

In addition, we do not find persuasive the state's related argument that the California Division of Labor Standards Enforcement ("DLSE") and the Department of Industrial Relations were not made parties to the present suit until the First Amended Complaint on September 7, 1995 and hence should not be held accountable for any fees incurred prior to that time. We hold that these parties are jointly and severally liable for the fees, given that the work involved aided in the preparation of the case against all the defendants and the case was not one in which the claims against each defendant varied or one defendant was more culpable than another. *See Woods v. Graphic Communications*, 925 F.2d 1195, 1207 (9th Cir. 1991) (defendant liable for fees previously incurred where fees assisted in preparing case against defendant and served as developmental work for case).

D. *Award of Fees for Work Performed in Previous Lawsuit*

The state asserts that the district court should not have allowed G & G to recoup attorney fees from the *Garza* lawsuit given that it did not prevail in that lawsuit. We uphold the district court's decision.

In *Webb v. Board of Educ.*, 471 U.S. 234, 243 (1985), the Supreme Court affirmed a district court's decision to

deny attorney fees for time spent pursuing optional administrative remedies, specifically school board proceedings. But the Court noted that the petitioner in that case "made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement," *id.*, suggesting that if that had happened, maybe the result would have been different. We followed the Supreme Court's lead in *Rock Creek Ltd. Partnership v. State Water Resources Control Bd.*, 972 F.2d 274, 279 (9th Cir. 1992), holding that a sponsor of a hydroelectric project was not entitled to attorney fees under §§ 1983 and 1988 for administrative proceedings before FERC. We reasoned that the FERC proceeding was not a condition precedent to plaintiff's entry to federal court, nor was it a part of a continuing federal court action. Because the FERC proceeding was not related or dependent, it could not form the basis for attorney fees. *Id.*

Cases from other circuits have addressed similar fee issues in non-administrative contexts. For example, the Third Circuit held in *Keenan v. City of Philadelphia*, 983 F.2d 459, 474 (3d Cir. 1992), that the district court did not abuse its discretion in including the time spent in labor arbitration in its fee calculation. It based its decision on the following interpretation of *Webb* by the Third Circuit: "[F]or the time spent pursuing optional administrative proceedings properly to be included in the calculation of a reasonable attorney's fee, the work must be 'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." *Pennsylvania v. Delaware*

Valley Citizens' Council for Clean Air, 478 U.S. 546, 561 (1986). In addition, the Eighth Circuit briefly addressed a similar situation in *Perkins v. Cross*, 728 F.2d 1099, 1100 (8th Cir. 1984), an action by picketers against municipal officials for violation of their civil rights. The court held that fees could be awarded for any "time the lawyer spent defending the plaintiffs in the original municipal court proceeding to the extent, if any, that research or investigation done in connection with that proceeding proved directly relevant to the successful prosecution of [their] later civil rights claims." *Id.*

Here, G & G made a showing that the work done in the *Garza* lawsuit was directly related to the present action – the allegations in that suit were identical to those made here. Counsel for G & G stated that the legal research and analysis performed in *Garza* were necessary for this action and accordingly saved him from expending more time on this lawsuit. Thus, unlike the *Rock Creek* case, the prior proceeding here was related to the present action. The two can even be viewed as a continuum of proceedings necessary to achieve the relief finally granted, given that the *Garza* case ended in a settlement stating that if the state took further action, G & G could refile the lawsuit, which is what happened. Moreover, caselaw reveals no requirement that a party must have prevailed in a prior proceeding to use that as a basis for attorney fees in another action.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART. Costs to Appellee G & G Fire Sprinklers, Inc.

KOZINSKI, Circuit Judge, dissenting.

In *San Bernardino Physicians' Services Medical Group v. County of San Bernardino*, 825 F.2d 1404 (9th Cir. 1987), we held that "[i]t is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim." *Id.* at 1408 (footnote omitted). While we recognized that any contract with the state gives rise to what could be characterized as a property interest, we held that this alone is not a basis for invoking the protections of due process. Rather, the interest in question must fall within a narrow category that might fairly be characterized as a civil right, *id.* at 1409, a right in public employment being the quintessential example. *Id.* (*citing Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972)). *San Bernardino* said that "construction contracts [and] purely material supply contracts" – contracts like the one we have here – do *not* create rights protected by the due process clause. *Id.* at 1410.

The majority abandons *San Bernardino's* nuanced framework in favor of a categorical approach that turns every right to receive payment on a public works contract into a property right protected by due process: "G & G's interest arises from its public works contract; it has a property interest in being paid in full for the construction work it has completed." Maj. op. at 1130. The opinion thus conflicts with *San Bernardino*, as well as the opinions of two other circuits. *See Mid-American Waste Systems, Inc. v. City of Gary*, 49 F.3d 286, 291 (7th Cir. 1995); *Walentas v. Lipper*, 862 F.2d 414, 418 (2d Cir. 1988); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 966 (2d Cir. 1988).

It is also very bad policy. The state here is engaged in a commercial activity where it holds no special sway over

other parties by virtue of its regulatory powers. In carrying out its project, the state has bargained for the construction to be done according to plan, on schedule, and consistent with health and safety codes; these are ordinary terms just like the ones private parties put into their construction contracts. The state has also bargained for a more exotic term, namely that contractors and subcontractors pay a prevailing wage to their employees. While this differs from what ordinarily appears in private construction contracts, it is not an exercise of the state's regulatory power; rather, it is a term that any private party could equally well put into its contract. If the contractor or subcontractor doesn't like the term, he can refuse to do business with the state.[1]

Here the state determined that G & G did not comply with its prevailing wage obligation, and thus withheld payments. This is no different from a builder's refusal to make progress payments when he discovers (or believes he discovers) a failure of performance on any other term of a standard construction contract, for example, that the plumbing isn't up to code. Withholding payments under such circumstances is the standard remedy. If the subcontractor believes he has met his obligations, he may resort to his remedies under his contract with the general contractor who, in turn, may seek relief from the state or assign his right to do so to the subcontractor. It's a run-of-the-mill contract dispute just like thousands routinely handled by the state courts without federal intervention.

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[1] That the prevailing wage term appears in the California Labor Code doesn't matter. No one is forced to comply unless he agrees to do business with the state.

In lieu of this common sense solution – which also complies with binding precedent – the majority invokes the full panoply of federal due process, including the requirement of a hearing *before* the state may withhold payments for what it believes is defective performance under the contract. While the opinion addresses only the prevailing wage term, its logic carries much farther: If the state discovers any other type of breach – for example, failure to complete the project on time or to comply with applicable safety codes – it must provide an advance hearing before it may withhold payment. This gravely burdens the state's most potent remedy for dealing with recalcitrant contractors and subcontractors.[2] Why the state should be saddled with this yoke when it engages in the purely commercial activity of construction – a burden not suffered by private builders – is beyond me.[3] *San*

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[2] The right to a predeprivation hearing discourages states from cracking down on inefficient, incompetent and corrupt contractors, since such contractors remain on the job (with a right to continuing payment) until the hearing is completed. "Any gains the agency anticipated from terminating inefficient or incompetent contractors or from stopping a project that had lost its value to the state might be consumed by payments during the hearing process and related litigation." Leonard Kreynin, Note, Breach of Contract as a Due Process Violation: Can the Constitution Be a Font of Contract Law?, 90 Colum. L. Rev. 1098, 1099 (1990).

[3] We can't always expect the government to act with unbounded compassion, patience and generosity. Indeed, when the government is acting as a commercial entity, taxpayers cajole it to act with all the ferociousness the marketplace demands. Certain limits must always apply: The government cannot, for example, use public works contracts to discriminate on the basis of race or sex. But when the government bargains

Bernardino clearly teaches that commercial contract rights must be vindicated in state court using state remedies. By ignoring this teaching the majority creates not just an intra-circuit and inter-circuit conflict but also a wholly unwarranted burden on the thousands of states, counties, cities and special use districts governed by our law. Government is too unwieldy already; there is no justification for adding this heavy layer of red tape. I respectfully dissent.

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over the commercial terms of the contract it should enjoy the same ability as private builders to draw up the deal as it likes and seek the best price and the best terms the marketplace allows.

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Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and DOES 1 through 20, Defendants.	) CIVIL NO. 95-4839 R) JUDGMENT) **The Honorable Manuel L. Real**) (Entered Nov. 9, 1995)

This action came on for hearing before the Court, on November 6, 1995, Honorable Manuel L. Real, District Judge Presiding, on a motion for summary judgment, and the evidence presented having been fully considered, the issues having been duly heard and a decision having been duly rendered.

It is ordered and adjudged that Plaintiff is awarded declaratory and injunctive relief against Defendants VICTORIA BRADSHAW; LLOYD W. AUBRY, JR.; DANIEL DELLAROCCA; ROGER MILLER; ROSA FRAZIER; DIVISION OF LABOR STANDARDS ENFORCEMENT; and DEPARTMENT OF INDUSTRIAL RELATIONS ("Defendants") as follows:

DECLARATORY RELIEF

1. California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813 violate the due process clause of the Fourteenth Amendment to the United States Constitution and, therefore, are invalid.

2. The practice of Defendants of issuing notices to awarding bodies requiring the withholding of monies from contractors due to alleged violations of California prevailing wage laws is unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution, and any such notices issued as to alleged violations by Plaintiff are invalid and of no force and effect.

INJUNCTION

3. Defendants are enjoined from applying or enforcing California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813 against Plaintiff or on account of alleged violations by Plaintiff of California prevailing wage laws (i. e., *Cal. Labor Code* §§1720-1861).

Plaintiff shall recover costs of suit.

DATED: Nov -7 1995, 1995

MANUEL L. REAL
THE HONORABLE MANUEL L. REAL
JUDGE OF THE UNITED STATES
DISTRICT COURT, CENTRAL DISTRICT

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G & G FIRE SPRINKLERS, INC., Plaintiff-Appellee, v. VICTORIA L. BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., Director; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and DOES 1 through 20, Defendants-Appellants.	No. 95-56639 D.C. No. CV-95-04839-MLR (Central California) ORDER (Filed Oct. 28, 1998)

Before: REINHARDT, KOZINSKI and HAWKINS, Circuit Judges.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Kozinski has voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has called for a vote to rehear this matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Cal. Labor Code § 1720

§ 1720. Public Works – Defined

As used in this chapter, "public works" means:

(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

Cal. Labor Code § 1727

§ 1727. Withholding of Forfeited Sums

Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body.

Cal. Labor Code § 1729

§ 1729. Withholding of Penalties from Subcontractor

It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law.

Cal. Labor Code § 1730

§ 1730. Transfer of Wages and Penalties to Labor Commissioner

Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring

a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job.

Cal. Labor Code § 1731

§ 1731. Suit Against Awarding Body – Wages and Penalties Retained

If suit is brought against the awarding body within the 90-day period and formal notice thereof is given to the awarding body within the 90-day period either by service of summons or by registered mail which is received within the 90-day period, the wages and penalties shall be retained by the awarding body pending the outcome of the suit, and be forwarded to the Labor Commissioner for disbursement pursuant to Section 1775 if the contractor does not prevail in the action. Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

Cal. Labor Code § 1732

§ 1732. Recovery of Wages or Penalties – Time for Action

Notwithstanding any other provision of law, the time for action by the contractor or his or her assignee for the recovery of wages or penalties is limited to the 90-day period and suit on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the

contractor or his or her assignees with reference to those wages or penalties.

Cal. Labor Code § 1733

§ 1733. Recovery of Wages and Penalties – Suit

Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.

Cal. Labor Code § 1771

§ 1771. Prevailing Per Diem Wage Required

Except for public works projects of one thousand dollars ($1,000) or less, not less that the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and

not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

Cal. Labor Code § 1772

§ 1772. Workers Employed Upon Public Work

Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

Cal. Labor Code § 1773

§ 1773. Adoption of Prevailing Per Diem Wage

The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the Director of the Department of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the director determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the director may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the director determines that another rate should be adopted.

Cal. Labor Code § 1773.2

§ 1773.2. Call for Bids – Specification of Wage Rates

The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bids specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

Cal. Labor Code § 1774

§ 1774. Specified Prevailing Wage – Must Be Paid

The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

Cal. Labor Code § 1775, at all relevant times herein. This version of § 1775 was operative prior to January 1, 1998. (An amended version of this statute, reprinted below, became effective on January 1, 1998)

§ 1775. Payment Less Than Stipulated Rate – Penalty

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her.

The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertance, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in

which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

Cal. Labor Code § 1775, as currently amended, effective January 1, 1998.

§ 1775. Payment Less Than Stipulated Rate – Penalty

(a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the mistake, inadvertence, or neglect of the contractor or subcontractor in failing to pay the correct rate of prevailing wages, or the previous

record of the contractor in meeting his or her prevailing wage obligations, or the willful failure by the contractor or subcontractor to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor or subcontractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages. If the Division of Labor Standards Enforcement determines that employees of a subcontractor were not paid the general prevailing rate of per diem wages and if the body awarding the contract under which the employees performed work did not retain sufficient money under the contract to pay those employees the balance of wages owed under the general prevailing rate of per diem wages, the contractor shall withhold an amount of moneys due the subcontractor sufficient to pay those employees the general prevailing rate of per diem wages if requested by the Division of Labor Standards Enforcement. The contractor shall pay any money retained from

and owed to a subcontractor upon receipt of notification by the Division of Labor Standards Enforcement that the wage complaint has been resolved. If notice of the resolution of the wage complaint has not been received by the contractor within 180 days of the filing of a valid notice of completion or acceptance of the public works project, whichever occurs later, the contractor shall pay all moneys retained from the subcontractor to the awarding body. The moneys shall be retained by the awarding body pending the final decision of an enforcement action, and be forwarded to the Labor Commissioner for disbursement pursuant to subdivision (d) if the subcontractor does not prevail in the action. Wages for workers who cannot be located after a diligent search by the Labor Commissioner shall be deposited in the Industrial Relations Unpaid Wage Fund pursuant to subdivision (c) of Section 96.7. Penalties shall be paid into the General Fund.

If the subcontractor prevails in the enforcement action, the awarding body shall release any funds retained pursuant to this subdivision to the contractor within 10 working days from the date of the final decision of the court.

(d) To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section or Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the division, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction

to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor and subcontractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contrator and subcontractor to establish that the penalties and amounts demanded in the action are not due. The contractor and subcontractor shall be jointly and severally liable in an enforcement action for any wages due. Following entry of a judgment for joint and several liability, the division shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim for wages against the contractor. From the amount collected from the subcontractor, the wage claim shall be satisfied prior to the amount being applied to penalties.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

(e) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

Cal. Labor Code § 1776, in part, at all relevant times herein. This version of § 1776 was operative prior to January 1, 1998. (An amended version of this statute, reprinted below, became effective on January 1, 1998.)

§ 1776. Payroll Records Required

(a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b)

* * *

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

* * *

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

* * *

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this

section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

* * *

Cal. Labor Code § 1776, in part, as currently amended, effective January 1, 1998.

§ 1776. Payroll Records Required

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty or perjury, stating . . .

(1) The information contained in the payroll record is true and correct.

* * *

(b)(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

* * *

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

* * *

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

* * *

Cal. Labor Code § 1813, at all relevant times herein. This version of § 1813 was operative prior to January 1, 1998. (An amended version of this statute, reprinted below, became effective on January 1, 1998.)

§ 1813. Working Hours Violations – Penalty

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which such workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the state or political subdivision who is authorized to pay the contractor money due him under the contract.

Cal. Labor Code § 1813, as currently amended, effective January 1, 1998.

§ 1813. Working Hours Violations – Penalty

The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted in the contract a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the Division of Labor Standards Enforcement.

This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

Cal. Civil Code §3103

§3103. Stop Notice

"Stop notice" means a written notice, signed and verified by the claimant or his or her agent, stating in general terms all of the following:

(a) The kind of labor, services, equipment, or materials furnished or agreed to be furnished by such claimant.

(b) The name of the person to or for whom the same was done or furnished.

(c) The amount in value, as near as may be, of that already done or furnished and of the whole agreed to be done or furnished.

(d) The name and address of the claimant.

* * *

The notice, in the case of any public work for the state, shall be filed with the director of the department which let the contract and, in the case of any other public work, shall be filed in the office of the controller, auditor, or other public disbursing officer whose duty it is to make payments under the provisions of the contract, or with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom the contract was awarded. No stop notice shall be invalid by reason of any defect in form if it is sufficient to substantially inform the owner of the information requested.

Any stop notice may be served by registered or certified mail with the same effect as by personal service.

Cal. Civil Code §3181

§3181. Persons Entitled to Serve Stop Notices

Except for an original contractor, any person mentioned in Section 3110, 3111, or 3112, or in Section 4107.7 of the Public Contract Code, or furnishing provisions, provender, or other supplies, may serve a stop notice upon the public entity responsible for the public work in accordance with this chapter.

Cal. Civil Code §3184

§3184. Time Limit for Effective Service of Stop Notice

To be effective, any stop notice pursuant to this chapter must be served before the expiration of:

(a) Thirty days after the recording of a notice of completion (sometimes referred to in public works as a notice of acceptance) or notice of cessation, if such notice is recorded.

(b) If no notice of completion or notice of cessation is recorded, 90 days after completion or cessation.

Cal. Civil Code §3186

§3186. Duty to Withhold – Amount Sufficient to Answer Claim and Litigation Costs

It shall be the duty of the public entity, upon receipt of a stop notice pursuant to this chapter, to withhold from the original contractor, or from any person acting under his or her authority, money or bonds (where bonds are to be issued in payment for the work of improvement) due

or to become due to that contractor in an amount sufficient to answer the claim stated in the stop notice and to provide for the public entity's reasonable cost of any litigation thereunder. The public entity may satisfy this duty by refusing to release money held in escrow pursuant to Section 10263 or 22300 of the Public Contract Code.

Cal. Civil Code §3210

§3210. Action to Enforce Stop Notice – Time of Commencement Thereof – Work of Improvement Subject to Acceptance by a Local Public Entity

An action against the original contractor and the public entity to enforce payment of the claim stated in the stop notice may be commenced at any time after 10 days from the date of the service of the stop notice upon the public entity and shall be commenced not later than 90 days following the expiration of the period within which stop notices must be filed as provided in Section 3184. * * *

No. 98-1204

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent G & G Fire Sprinklers, Inc., respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Ninth Circuit's opinion in this case. That opinion is reported at 156 F.3d 893 (9th Cir. 1998).

STATEMENT OF THE CASE

I. Factual Background

Petitioners here are the California Division of Labor Standards Enforcement ("DLSE"), the Department of Industrial Relations ("DIR"), and officials thereof (hereafter, collectively the "state" or "petitioners"). The DLSE and DIR are responsible for enforcing provisions of the California Labor Code dealing with the prevailing wage law. A-8; Cal. Lab. Code §§ 1720-1861; Pet. at 2-3. G & G Fire Sprinklers, Inc. (respondent) is a fire protection company which installs sprinkler systems, frequently as a contractor or subcontractor on public works projects.[1]

The state's petition challenges a decision of the Ninth Circuit Court of Appeals which held that provisions of the California Labor Code authorizing the state to seize earnings of subcontractors who have allegedly failed to comply with prevailing wage requirements violate due

[1] Pursuant to Supreme Court Rule 29.1, Respondent G & G Fire Sprinklers, Inc. advises the Court it has no parent company or subsidiaries.

process by not providing for a pre- or a timely post-deprivation hearing.

The relevant facts are set forth in the amended opinion of the Ninth Circuit Court of Appeals.[2] As noted in that opinion, under the statutory scheme at issue, all contractors and subcontractors who enter into public works contracts are required to pay the prevailing local wage to their workers. A-8; Cal. Lab. Code § 1771. If a contractor or subcontractor is not in compliance with provisions of the prevailing wage law, it may be required to "forfeit" the differential between the amount being paid and the amount determined to be owed to workers under the "prevailing wage" law. A-8; Cal. Lab. Code § 1775. In addition, the Labor Commissioner may impose fines for failure to comply with certain other provisions of the code related to enforcement of the prevailing wage provisions. See Cal. Lab. Code §§ 1727, 1775, 1776, 1777.5, and 1813. The public entity which enters into a public works contract (the "awarding body") is required by statute to withhold any sums "forfeited" – including fines – from payments due the contractor. Cal. Lab. Code § 1727. No sums may be withheld without a full investigation by either the awarding body or the DLSE unless the withholding is from the final payment to be made to the prime contractor. *Id.* Issuance of a notice to withhold

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[2] The original opinion of the Ninth Circuit was issued February 3, 1998. The decision was amended September 10, 1998, and that amended decision is found at 156 F.3d 893. For consistency and the convenience of the Court, citations in this document are to the amended decision contained in the appendix to the Petition for Writ of Certiorari, at A-2 to A-38.

to an awarding body is a standard procedure utilized by the DLSE. A-9.

Where it is a subcontractor who has purportedly violated the prevailing wage law, the prime contractor is authorized by statute to withhold from the subcontractor's earnings an amount identical to sums which have been withheld by the awarding body. A-9; Cal. Lab. Code § 1729. The Labor Code requires that all public works contracts contain provisions stipulating to these withholdings. Cal. Lab. Code §§ 1775, 1776, 1777.5, and 1813; see also A-9.

The "exclusive remedy after withholding" is a lawsuit by the prime contractor or its assignee to recover the payments withheld. A-9; Cal. Lab. Code § 1733. If no lawsuit is filed within 90 days, the money is forwarded to the State Treasurer. Cal. Lab. Code § 1730. Amounts collected as wages are distributed to workers, and the fines and penalties become part of California's general fund. Cal. Lab. Code §§ 1730, 1775.

Here, the DLSE, exercising its authority under California Labor Code section 1727, issued withholding notices to the awarding bodies for three projects on which respondent was employed as a subcontractor, directing those bodies to withhold at least $120,000 already earned by respondent on these projects. A-10; see also Pet. at 3. Pursuant to the statutory scheme, the money was withheld from each prime contractor, who, in turn, withheld the money from respondent. A-10. There was no evidence respondent was notified of the basis for the DLSE's decision to withhold these funds, A-10, and the Labor Code does not grant subcontractors like respondent the right to

"any type of hearing to contest a withholding," A-15. Moreover, respondent had no right to challenge the withholding by bringing an action directly against the DLSE, since it had no contract with the DLSE or any other state body. A-15. Finally, lacking privity of contract with the awarding body, respondent had no right to bring a cause of action against that body either, unless the prime contractor assigned its own cause of action to respondent. A-15.

II. Procedural History

Respondent filed this action for declaratory and injunctive relief on July 21, 1995, asserting that the DLSE's issuance of statutory notices to withhold, without providing a prior hearing, constituted a deprivation of property without due process of law. A-10.

The district court granted respondent's motion for summary judgment, while denying the state's motion to dismiss. Holding that the specified provisions of California's Labor Code were unconstitutional, the court permanently enjoined the state from enforcing those statutes against respondent.[3] A-7 to A-8.

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[3] Specifically, the district court declared unconstitutional the following Labor Code provisions: section 1727 (granting awarding body authority to withhold all wages and penalties forfeited pursuant to these provisions from payments due the contractor); sections 1730-33 (providing that wages and penalties withheld be transferred to the Labor Commissioner, to be retained until after outcome of litigation, if any, by contractor or its assignee, and limiting period in which to bring such an action to 90 days); section 1775 (providing a penalty of up to $50

Petitioners sought review in the Ninth Circuit Court of Appeals. On February 3, 1998, that court issued its original opinion in the matter, Judge Kozinski dissenting. A-39 to A-76. Petitioners filed a petition for rehearing which was granted, and the Ninth Circuit issued its amended opinion and order on September 10, 1998, Judge Kozinski again dissenting. Pet. at 2, 10; A-35.

In its amended decision, the Ninth Circuit first determined respondent had standing to challenge the constitutionality of the statutory scheme in question, having demonstrated (1) an injury (in the form of $120,000 it had earned but which was being withheld by the state), A-11 to A-12; (2) a causal connection between that injury and the conduct complained of (since it was respondent the state had investigated and who was "clearly the 'object of the action' " taken by the state), A-13; and (3) that the injury would be redressed by a favorable decision in this action, A-11 to A-14.

The court also found respondent had satisfied the requirements for asserting a due process claim, in that it had a protectible property interest "in being paid in full for the construction work it has completed." A-16 to A-17, citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969). The court concluded that the statutory scheme, which provides neither a pre- nor post-deprivation hearing at which respondent could challenge the

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per worker per day for each worker not paid the prevailing wage); section 1776(g) (assessment of penalties for failure to comply with a request for payroll records within ten days); and section 1813 (assessment of penalties for overtime work performed). A-7.

"validity of the state's findings," violated the Due Process Clause of the Fourteenth Amendment. A-23.

Nevertheless, the Ninth Circuit found the injunction issued by the district court overbroad in two respects. First, the Ninth Circuit held the statutory withholding provisions need only be declared unconstitutional *as applied*, allowing the state to remedy the violation by the adoption of regulations providing a pre-deprivation hearing or a prompt post-deprivation hearing. A-27; see also, A-22. Second, the court found that rather than granting "a permanent injunction prohibiting the state from enforcing the withholding provisions against G & G," the appropriate action was to enjoin the state from enforcing those provisions unless it chose to adopt reasonable hearing procedures within a reasonable period of time.[4] A-27.

As noted, Judge Kozinski dissented, asserting that the majority decision was bad policy and turned every public works contract into a protectible property interest. A-35 to A-38.

The state petitioned again for rehearing and rehearing en banc. See, e.g., Pet. at 2. Those motions were denied on October 28, 1998, Judge Kozinski voting to grant rehearing and rehearing en banc. See Pet. at 11.

The Petition For Writ of Certiorari was filed January 26, 1999.

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[4] The state subsequently adopted certain temporary "emergency" regulations. See Cal. Code Regs., tit. 8, §§ 16410-16414; see Respondent's Appendix ("RA")-1.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION. THE NINTH CIRCUIT'S DUE PROCESS ANALYSIS WAS BASED ON THE STATE'S EXERCISE OF ITS REGULATORY POWERS, NOT UPON BREACH OF CONTRACT. THE DECISION THEREFORE DOES NOT CONFLICT WITH CASES FROM OTHER CIRCUITS.

A. Petitioner Has Mischaracterized The Issue Decided By The Court Of Appeals.

In its petition for certiorari, the state presents the following single question:

> "Is a commercial contractor who claims that a public agency breached a contract by failing to make payment entitled by the Due Process Clause of the Fourteenth Amendment to anything more than the opportunity to pursue its contract claim through an ordinary state court lawsuit?" (Pet. at i.)

That question, however, is not raised by the decision of the court of appeals, or by the trial court record upon which that decision was based. In this lawsuit, respondent challenged the DLSE's enforcement of specific provisions of California's Labor Code. Respondent did *not* claim the DLSE's conduct breached any agreement to which respondent was a party. Accordingly, the court of appeals was not asked to decide – and did not hold – that a contractor is entitled to a due process hearing concerning every dispute which arises out of the breach of a public works contract.

Instead, the question before the Ninth Circuit was:

> "[W]hether certain California Labor Code provisions, authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirements, violate the Due Process Clause of the Fourteenth Amendment because no notice or hearing is required before such adverse action is taken." A-7.

The court concluded that because respondent had demonstrated a vested property interest (that is, money earned and due for contractual obligations already performed), and because the DLSE – *which was not a party to the agreement* – had deprived respondent of those contractual earnings without adequate procedural protections, respondent had stated a due process claim. See A-7 to A-24.

Although the state now claims the Ninth Circuit's decision has effected a "sweeping expansion of property rights and due process protections," Pet. at 15, this contention is pure hyperbole. The state's claim of unwarranted constitutional expansion rests entirely upon its mischaracterization of the issue actually decided by the court. In fact, the decision below breaks no new due process ground, and engenders no conflict with cases from other circuits. The Ninth Circuit simply applied well-established due process principles to the regulatory conduct at issue in this case. We now explain more fully.[5]

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[5] As noted above, before commencing its due process analysis, the court of appeals first determined respondent had standing to bring this action for declaratory and injunctive

B. The Ninth Circuit Properly Held That Respondent's Entitlement To Monies Already Earned Under Contract Is A Protectible Property Interest.

At the outset of its Fourteenth Amendment analysis, the Ninth Circuit noted that a due process claim has two elements: "(1) a deprivation of a protectible interest, and (2) denial of adequate procedural protections." A-16, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970). Therefore, in reviewing the constitutional propriety of the state's actions in this case, the Ninth Circuit first considered whether respondent possessed a property interest protected by the Due Process Clause of the Fourteenth Amendment. Citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 569-570 (1972), the court evaluated "(1)

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relief. The court based this conclusion on the state's withholding of some $12[illegible],000 to which respondent claimed entitlement, finding this to be a concrete and particularized injury, caused by the state, which could be redressed by way of this legal action. A-11 to A-16, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Concerning causation, the court held respondent was "clearly the object of the [state's] action," and it was the state's action which in turn had caused respondent's injury. A-13 to A-14.

The state has essentially abandoned its standing argument (which had been predicated on the lack of privity between respondent and the awarding bodies), merely alluding to it once in a footnote in the petition. See Pet. at 16, n. 10. It should be noted, though, as the Ninth Circuit explained, that cases such as *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980), cited by the state below and again in footnote 10 of the petition, considered whether the plaintiff had a property interest protected by due process, not whether the party had standing. See A-11, n. 2.

what type of interest has been deprived, and (2) whether that interest is protected by the Due Process Clause." A-16 to A-17. The court concluded respondent had a "property interest in being paid in full for the construction work it has completed" under its contract. A-17, citing *Sniadach v. Family Finance Corp., supra,* 395 U.S. 342.

There is nothing remarkable about this conclusion. Although the state suggests otherwise, the Ninth Circuit was well aware that "not all public contracts give rise to a protectible due process interest," A-17, citing *San Bernardino Physicians' Servs. Med. Group, Inc., v. County of San Bernardino,* 825 F.2d 1404, 1408 (9th Cir. 1987), and that " 'the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts,' " A-17, quoting *Brown v. Brienen,* 722 F.2d 360, 364 (1983). The court merely found that this respondent, in this case, did possess a vested property interest in money already earned under its contracts, and that this interest was entitled to due process protection.

The state argues that because the contract between the prime contractor and the awarding body stipulated to the withholding of payments to cover unpaid prevailing wages and related penalties, respondent had no protectible property interest in monies already earned. Citing *S & D Maintenance Co. v. Goldin,* 844 F.2d 962 (2nd Cir. 1988), and *Christ Gatzonis Electrical Contractor, Inc. v. New York City School Construction Authority,* 23 F.3d 636 (2nd Cir. 1994), the state suggests respondent's right to be paid for work completed was too insecure to be a property interest. Pet. at 17-18.

The state is mistaken, and its reliance on the above Second Circuit cases is misplaced, for those decisions involved facts functionally different from the present case. In *S & D Maintenance Co. v. Goldin, supra,* for example, plaintiff entered into contracts with the city to maintain its parking meters. When the city refused to pay certain invoices submitted under the contract pending a criminal investigation into corruption charges related to procurement of one of plaintiff's contracts, plaintiff filed suit alleging a due process violation. The court held plaintiff possessed no cognizable property interest because under the agreements in question, the city essentially had sole discretion whether to make interim payments, and whether to continue the contractual relationship. *S & D Maintenance Co. v. Goldin, supra,* 844 F.2d at 968, 969.

Similarly, in *Christ Gatzonis Electrical Contractor, Inc., supra,* plaintiff entered into electrical contracting agreements with the New York School Construction Authority (the "SCA"). When the president of plaintiff company was arrested on bid-rigging and bribery charges concerning one of the contracts, the SCA refused to honor plaintiff's payment requisitions, causing plaintiff to bring suit. The agreement in question, however, gave SCA complete authority to approve costs, and the ability to exercise set-off. Because of this "substantial latitude in making and approving payments," the court again found no secure property interest. *Id.* at 639-640.

Thus in both cases relied upon by the state, it was the public body's *virtually unbridled discretion* to withhold payment under the contract (analogous to the discretion contained in an at-will employment agreement) which led

the court to conclude the asserted interests were not secure enough to give rise to a property interest in the first place.[6] In contrast, there was no such absolute discretion in the present case, nothing to suggest that the prime contractor could, *completely at its own discretion*, refuse to pay respondent where all work under the agreement had been undeniably performed. Stated differently, but for the intervention of a third party (the DLSE), respondent would have received its monies.

Thus the contractual earnings at issue in this case were functionally identical to the wages at issue in *Sniadach v. Family Finance Corp., supra*, 395 U.S. 337, and gave rise, as they did in *Sniadach*, to a protectible property interest.[7] See A-17. Accordingly, the Ninth Circuit correctly concluded that the seizure of respondent's earnings by order of the DLSE (a stranger to the contract) gave rise to a cognizable due process claim. See A-16 to A-21.

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[6] Indeed, in *Christ Gatzonis* the court initially observed "[i]t is well established that a contractor has a right to timely payment for work it performs under a contract with a state agency, and that such right is a property interest protected by the due process clause." *Id.* at 639. As noted, however, the court nevertheless concluded that the specific contract terms in that case overrode this general principle. Compare, e.g., *Signet Constr. Corp. v. Borg*, 775 F.2d 486 (2d Cir. 1985) (court finds that contractor's right to timely payment for work performed constitutes a protectible property interest).

[7] It bears emphasis that the Ninth Circuit found the seizure of respondent's earnings under the statutory scheme substantially damaged respondent's ability to do business. A-10.

C. The DLSE Was Not Party To Any Agreement Involving Respondent. Therefore, Although Respondent's Property Interest Arose From Contract, The DLSE's Infringement Of That Interest Was An Assertion Of Its Regulatory Powers, Not The Exercise Of A Contractual Right. The DLSE Had No Contract Rights To Assert Here.

The state argues that because the prevailing wage provisions must be contained in public works contracts, this case is really no more than a routine contract dispute, not deserving of due process scrutiny. Pet. at 12-16, 18-23; see also A-18. The Ninth Circuit appropriately rejected this argument, finding "this case does not involve a breach of contract claim or a challenge to the contract itself." A-18. Respondent did not allege that the state's enforcement actions somehow constituted a breach of contract. Indeed, respondent could not have made this allegation, because it had not entered into any contract with petitioners.[8] See A-19.

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[8] In fact, as noted, the state argued below that respondent had no standing to bring this action for declaratory relief because it was not in privity with the contracting public body. See A-11 to A-15.

In a related vein, the Ninth Circuit also rejected the state's contention that respondent could not state a due process claim because it was only indirectly affected by state action. The court found the state's reliance on *O'Bannon v. Town Court Nursing Ctr., supra*, 447 U.S. 773, "misplaced," correctly noting that on this record, respondent *was* in fact the direct target of the state's action. A-20 to A-21. The court also stated that, even assuming for sake of argument the state's actions against respondent were indirect, "such action would fall within the category expressly left open by the *O'Bannon* Court – action taken by the

The state's argument confuses the *creation* of a property interest with its *deprivation* by state action. While it is true respondent's property interest derived from contract, the state's infringement of that interest occurred from *outside* the contract. Significantly, no petitioner was party to any agreement under which respondent earned its monies. Respondent was deprived of its earnings because a stranger to the contract – the DLSE – ordered the contracting public entities to withhold monies representing civil penalties and forfeitures assessed against respondent. See Statement of the Case, *supra*. Under this statutory scheme, the awarding public body had no choice but to withhold the amounts ordered by the DLSE. See Cal. Lab. Code § 1727; see also *Krueger v. San Francisco*, 198 Cal.App.3d 1, 8, 243 Cal.Rptr. 585 (Cal. 1988).

The Ninth Circuit thus correctly pronounced that this case was not "a mere contractual dispute," but "a direct constitutional challenge to the state's *regulatory* power as embodied in these [Labor Code] statutes. . . . " A-19, emphasis added. This conclusion is in fact mandated by decisional law of the California Supreme Court. In *Lusardi Construction Co. v. Aubry* 1 Cal.4th 976, 4 Cal.Rptr. 837 (Cal. 1992), that court confirmed that the DLSE's duty to enforce the prevailing wage provisions is a statutory function which exists independent of any contractual provisions. In *Lusardi*, a hospital (wishing to expand its facility) agreed to act as "agent" for a private corporation and hire a contractor for the expansion. In that capacity, the hospital entered into an agreement with Lusardi, a

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government against one party for the purpose of punishing or restraining another." A-21.

contractor, omitting any provisions relative to the prevailing wage law. The DLSE, however, subsequently determined the construction was in fact a public work, subject to the prevailing wage laws, and threatened to enforce those statutes. Lusardi brought suit, arguing that because the terms of its contract did not expressly require payment of prevailing wages, it had no obligation to do so. California's high court rejected the argument, holding that whether or not they were incorporated into a contract, the Labor Code prevailing wage provisions were *statutory* requirements, "not limited to those workers whose employers have contractually agreed to pay the prevailing wage." *Id.* at 987.

Petitioners echo Judge Kozinski's dissent and claim the state should be treated the same as any other "marketplace participant" concerning its public works contracts. Pet. at 19-23; see also A-35 to A-38 [dissent]. This again misses the point. To repeat – petitioners were not parties to any of these public works contracts, and hence did not participate in this marketplace. The fact that *some* public body entered into a public works contract does not convert *petitioners'* status from outsider to marketplace participant. Stated more specifically, the DLSE and the DIR are not in privity with every public entity – municipal, county, or otherwise – entering into a public works contract. The California Supreme Court has confirmed as much:

> "In this case, there is no privity or identity of interest between the District [the awarding body] and the Director. Instead, there is a direct and palpable conflict. As its actions clearly evidence, the District had an interest in obtaining

> the lowest possible cost for the construction of the hospital expansion project. The interest of the Director is in enforcing the prevailing wage laws." *Lusardi Construction Co. v. Aubry, supra*, 1 Cal.4th at 995.[9]

In other words, the DLSE and DIR, in enforcing the prevailing wage provisions of the Labor Code, advance the policy interests of the state of California, not the proprietary interests of the state operating as a free market participant. See *id.*, at 987 (overall purpose of prevailing wage law is to benefit and protect employees on public works projects). The state's conduct in this regard is thus purely regulatory in nature. See also, e.g., *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 283-284, 287 (1986) (state was acting as regulator rather than proprietor for purposes of preemption analysis when, under state statute, it refused to do business with persons who had committed certain NLRA violations; state's action was to enforce the NLRA and deter labor law violations, and "no other purpose could credibly be ascribed").[10]

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[9] Moreover, even from the awarding bodies' perspective, to say that the withholding provisions *required by state law to be in the contracts* were the result of arms-length bargaining by marketplace participants is to indulge in fantasy. As the above quote from *Lusardi* suggests, it is unlikely the contracting public bodies would have bargained for prevailing wage provisions if acting purely to further their own proprietary interests like any other commercial entity.

[10] Citing decisions by this Court, petitioners argue that the state, in its proprietary role, can act like any other private contracting party in the marketplace. See Pet. at 20-23. That is not the point. The question is whether *in this case*, the state's conduct was proprietary. The Ninth Circuit found it was not. The analysis set forth above demonstrates the court was correct.

D. The Ninth Circuit Decision Does Not Conflict With Decisions Of Other Circuits.

In sum, the Ninth Circuit here applied basic due process analysis to a state agency's enforcement of California Labor Code provisions, where the enforcement deprived a party of monies already earned under a construction contract to which the agency was not a party. Under these circumstances, the court concluded adequate procedural protections must be provided. This unremarkable conclusion does not conflict, as the state would have this Court believe, with due process decisions from other circuits. See Pet. at 13-14.

In making its assertion of "conflict," the state again overlooks the fundamental distinction between the state acting in a proprietary capacity, and the state acting as a regulatory agency, as occurred in this case. The circuit court decisions cited by the state all involved due process claims brought against a contracting governmental body based upon an alleged breach of contract. The state defendants in those cases were parties to the contracts in question, and their conduct was assertedly an exercise of their contractual rights. None of those cases involved a situation where a contractor's earnings were seized by order of a non-contracting state agency enforcing state statutory provisions. See Pet., at 13-14, citing *S & D Maintenance Co., Inc. v. Goldin, supra,* 844 F.2d 962 (contract between plaintiff and city; city refused to pay, asserting contract rights); *Martz v. Village of Valley Stream,*

No decision of this Court cited by the state in its petition compels a contrary conclusion.

22 F.3d 26 (2nd Cir. 1994) (contract with village for attorney services; village refused to make payment, asserting contractual rights); *Christ Gatzonis Electrical Contractor, Inc. v. New York City School Construction Authority, supra,* 23 F.3d 636 (contract between plaintiff and construction authority; authority refused to pay, asserting contract rights); *Bleeker v. Dukakis,* 665 F.2d 401 (1st Cir. 1981) (plaintiff had at-will employment contract with Department of Public Health, and brought suit challenging termination); *Brown v. Brienen, supra,* 722 F.2d 360 (plaintiff employees alleged sheriff, county, and board breached contract to provide compensatory time off from their jobs); *Reich v. Beharry,* 883 F.2d 239 (3rd Cir. 1989) (contract between attorney and county for legal services; county controller refused to pay); *Linan-Faye Construction Co., Inc. v. Housing Authority,* 49 F.3d 915 (3rd Cir. 1995) (contract between plaintiff contractor and housing authority; authority terminated contract).[11]

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[11] We again point out that in *S & D Maintenance, supra,* 844 F.2d 962, and *Christ Gatzonis, supra,* 23 F.3d. 636, the Second Circuit found the contracts too insecurely held to give rise to a property interest in the first place. (See discussion *supra,* at subsection B.) In *Bleeker v. Dukakis, supra,* 665 F.2d 401, the First Circuit similarly held that an at-will employment contract did not create a protectible property interest. And in *Linan-Faye Construction Co., Inc. v. Housing Authority, supra,* 49 F.3d 915, the court found no protected interest because the contracting state entity could terminate the contract for reasons other than for cause, including mere convenience.

It should also be noted that the courts in *Reich v. Beharry, supra,* 883 F.2d 239, and *Brown v. Brienen, supra,* 722 F.2d 360, did not actually decide the question of whether the contracts at bar gave rise to protectible property interests, but instead based their decisions on other grounds.

Lastly, the state, again invoking Judge Kozinski's dissent, places particular emphasis on the Ninth Circuit's prior decision in *San Bernardino Physicians' Servs. Med. Group, Inc. v. County of San Bernardino, supra,* 825 F.2d 1404, contending the present decision ignores that earlier precedent. Pet. at 14-15. Not so. *San Bernardino* is not this case. There, a corporate physicians' group contracted with a county board of supervisors to provide professional services to the county medical center. The plaintiff medical group brought a due process claim against the board, alleging that conduct by the board and various county employees had forced the expiration of one of the group's contracts and the termination of the other. *Id.* at 1405-1406. The question before the court of appeals was thus whether the group's right to performance under its contracts with the board constituted a sufficient property interest to merit constitutional protection. *Id.* at 1407. The court confirmed that protectible property rights can be created by contract, *id.* at 1407-1408, but determined that the corporate employment contract at issue did not warrant due process protection, *id.* at 1409-1410.

Again, as with the other authorities relied upon by the state, *San Bernardino* involved a dispute between parties to a contract. The plaintiff and public entity were in contractual privity with each other, with the plaintiff's claim of a due process violation being predicated solely upon the defendants' alleged breach of contractual obligations. *San Bernardino* did not involve the statutory-based seizure of earned income by a state agency which was a stranger to the plaintiff's contract. That decision is

therefore inapposite, and was properly distinguished by the Ninth Circuit in its opinion below.[12]

In sum, as all the above makes clear, the state has asked this court to consider a question from which a necessary predicate – the elevation of a routine breach of contract action into a due process claim – is missing. As a result, what the petition essentially asks for is an impermissible advisory opinion. This Court should decline to render such opinion, and deny the petition.

II. A LAWSUIT FOR BREACH OF CONTRACT IS NOT A CONSTITUTIONALLY-ADEQUATE POST-DEPRIVATION HEARING AFTER THE SEIZURE OF FUNDS UNDER THESE CALIFORNIA LABOR CODE PROVISIONS.

Having determined that respondent's property interest in earnings seized by the state was protected by due process, the Ninth Circuit next considered what sort of process was constitutionally required here. Although respondent had asserted, and the District Court determined, that the Labor Code provisions in question were facially unconstitutional, the Ninth Circuit found the statutes were invalid as applied. The court held that to comply with due process requirements, the state must minimally provide the opportunity for a timely pre- or post-deprivation hearing regarding wages and penalties

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[12] Moreover, the alleged property right in *San Bernardino* – the group's interest in the continuation of its employment contract – is quite different from the interest at issue in this case: payment of income already earned.

seized from the earnings of contractors and subcontractors.[13] A-21 to A-24.

In determining that the Labor Code procedures failed constitutional scrutiny, the Ninth Circuit relied upon the fundamental due process notion that individuals must have notice "and a meaningful opportunity to be heard before the government deprives them of property." A-21, citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). The court noted that where a "valid governmental interest is at stake" postponement of the hearing may be justified until "after the initial deprivation." A-21 to A-22. Nevertheless, in such circumstances, "a *prompt* post-deprivation hearing must be held." A-22, citing *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988), emphasis added. The court thus concluded that even though the state's interest in ensuring payment of a prevailing wage was sufficiently important to justify withholding funds, A-22 to A-23, the state must provide a pre-deprivation hearing or a prompt post-deprivation hearing "as required by the Due Process Clause." A-27.

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[13] The Ninth Circuit pointed out that while California's prevailing wage act was modeled on the Davis-Bacon Act, 40 U.S.C. §§ 276a et seq., the Davis-Bacon Act "provides for an extensive hearing and appeal structure through its implementing regulations." A-24 n. 11. These include procedures which allow the prime contractor or the subcontractor, within 30 days after a withholding, to request an administrative hearing to review the findings leading to the withholding. *Id.* The findings of the administrator may be appealed to an administrative law judge, and ultimately, to the federal court. *Id.*, citing 5 U.S.C. § 704.

Delay in providing such a hearing puts the very livelihood of the subcontractor at risk. As the Ninth Circuit emphasized:

> "The issuance of the notices to withhold had a substantial detrimental effect on G & G's ability to do business, as their effect is to reduce, or cut off, payments for work performed and to damage G & G's reputation in the industry. Inasmuch as G & G intends to perform further public works projects in the future, the issuance of additional improper notices to withhold also could impair G & G's cash flow and ability to do business." A-10.

The state argues, however, as it did below, that adequate process could be provided by a post-deprivation breach of contract action. Pet. at 23-25. This argument fails on two counts.

First and foremost –

> "Under California's Labor Code, a subcontractor cannot sue the state for withholding funds; only prime contractors can. A subcontractor theoretically could sue the prime contractor, but the latter has a defense of withholding the funds pursuant to state law. In addition, the Labor Code does not grant subcontractors the right to any type of hearing to contest a withholding. Therefore, if a prime contractor chooses not to contest a withholding or to assign its rights to sue to the subcontractor, the subcontractor is left holding a quite empty bag." A-15, fn. omitted; see also A-22 to A-23, A-27; Cal. Lab. Code §§ 1727, 1729, 1730, 1733.

In other words, a subcontractor like respondent can suffer severe economic injury as a result of state action

without having any reliable vehicle to challenge the state's conduct. This inability of the subcontractor to control its own rights or remedies after seizure of its earnings is a fatal constitutional defect in this Labor Code statutory scheme.

Second, even assuming a subcontractor could, in its own right, bring a statutory action against the awarding body challenging the withholding, such lawsuit, with its inherent delay, would not constitute an "opportunity to be heard at a meaningful time in a meaningful way." A-23; see also A-23 n. 9. It could take years to challenge the state's seizure through litigation, including potential appeal; in the meantime, the state retains possession of the withheld earnings. Cal. Lab. Code § 1731. Such delay could severely impact a subcontractor or contractor's business. See A-10. Even if the operation is successful, the patient dies.

Moreover, unlike a routine breach of contract action, California Labor Code section 1733 limits recovery by the contractor to withheld wages and penalties. As a result, a lawsuit brought under the statute would not compensate for consequential injuries caused by the state's interim deprivation pending resolution of the action. See Cal. Lab. Code § 1731, 1733. In a situation like respondent's, where the temporary deprivation can cause significant injury to reputation and economic stability, this supposed litigation remedy is therefore quite hollow. See A-10; see also *United States v. James Daniel Good Real Prop., supra,* 510 U.S. at 54-56 (availability of post-deprivation lawsuit could not compensate for the temporary deprivation that an earlier hearing might have prevented).

In concluding that a post-deprivation lawsuit did not satisfy due process in this case, the Ninth Circuit distinguished this Court's holdings in *Parratt v. Taylor*, 451 U.S. 527 (1981), overruled in part on other grounds by *Daniels v. Williams*, 474 U.S. 327 (1986), and *Hudson v. Palmer*, 468 U.S. 517 (1984), decisions relied upon by the state in its present petition. A-23 n. 9; Pet. at 26-27. In those cases, which involved claims by prison inmates that state employees had deprived them of personal property, the seizures occurred through the unauthorized negligent or intentional acts of individual state employees, not through implementation of a statutory procedure. This Court held that where "deprivations of property are effected through random and unauthorized conduct of a state employee, pre-deprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur." *Hudson v. Palmer, supra*, at 533. In that situation, this Court determined, post-deprivation state tort remedies could provide adequate process. *Id.* at 534.

As the Ninth Circuit observed, however, no random and unauthorized act is involved in this case. A-23, n. 9. Here, the state's conduct is not only *authorized*, but is embodied in a statutory system. Where the state totally controls the procedures used to deprive a person of his property, *Parratt* and *Hudson* simply do not apply. See A-23, n. 9; compare also *Ingraham v. Wright*, 430 U.S. 651 (1977) (Court held that the presence of well-established regulations and safeguards to protect against the abuse of corporal punishment, combined with the availability of civil and criminal sanctions against teachers and school authorities, provided adequate process).

The state claims, though, that the Ninth Circuit's determination that a post-deprivation lawsuit is sufficient conflicts with decisions from other circuits which have held that a state lawsuit satisfies due process. Pet. at 23-27. Those decisions are distinguishable. In *Reich v. Beharry, supra*, 883 F.2d 239, for example, a county controller refused to authorize payments to an attorney who had done legal work under contract with the county. In *Brown v. Brienen, supra*, 722 F.2d 360, state employees asserted their employer had breached an agreement to give them unpaid, compensatory time off if they worked extra hours. Both cases thus involved singular breaches of contract. Here, in contrast, the state enforced a statutory scheme which enabled the systematic and repetitive seizure of earnings from respondent. Moreover, neither *Reich* nor *Brown* described the sort of disabling – and ongoing – economic consequences described by the court of appeals in this case. See A-10. Further, there was no indication in either *Reich* or *Brown* that a recovery by those plaintiffs for breach of contract could not compensate for the deprivations they had suffered in the interim. As discussed above, just the opposite is true here – not only are such damages precluded by the prevailing wage statutes, but even if available, they would be unlikely to compensate the injury incurred while the state retained respondent's earnings.

The state suggests that two additional post-deprivation litigation remedies were available to respondent:

equitable subrogation and filing a "stop notice."[14] Pet. at 24-25. Neither of these procedures, however, would satisfy the due process concerns which underlie the Ninth Circuit decision. First, respondent could *not* bring an action against the awarding body under a theory of equitable subrogation because, as the Ninth Circuit pointed out, the facts in this case simply "do not meet the traditional elements of equitable subrogation." A-24, citing *Caito v. United California Bank*, 576 P.2d 466, 471 [20 Cal.3d 694] (Cal. 1978). Those elements are:

> " '(1) Payment must have been made by the subrogee to protect his own interest. (2) The subrogee must not have acted as a volunteer. (3) The debt paid must be one for which the subrogee was not primarily liable. (4) the entire debt must have been paid. (5) Subrogation must not work any injustice to the rights of others.' " *Id.*, citations omitted.

The first element is inapplicable here, because the "payment" made by respondent was not made on behalf of anyone else: respondent cannot subrogate to anyone's position, because no one else "owes" the asserted debt. The second element is also inapplicable, because although respondent was certainly not a "volunteer," it equally did not "act." Payment was withheld from it, not "paid" by it. Similarly, respondent does not meet the

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[14] The "stop notice" argument was raised by the state for the first time in its second petition for rehearing The state's failure to raise this argument prior to its second petition for rehearing waives the issue. See, e.g., *Boardman v. Estelle*, 957 F.2d 1523, 1534 (9th Cir. 1992).

third criteria, for while there has never been any determination of "liability," if anyone is the "object" of the state's withholding, it is respondent. The subrogation shoe does not fit respondent. See A-24, n. 9.

Finally, even assuming the "stop notice" argument has not been waived, the state does not explain how this procedure could override the rigorous enforcement provisions of California's prevailing wage law so as to provide a prompt and meaningful hearing to respondent. These Labor Code provisions, as noted, authorize the awarding body to withhold forfeited sums from the prime contractor who, in turn, has a statutory defense to any claim for those funds by the subcontractor. The state cites no authority which holds that this fixed statutory scheme is somehow subordinated to a "stop notice" proceeding or that such proceeding would satisfy the Ninth Circuit's appropriate due process concerns.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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BARCLAYS OFFICIAL CALIFORNIA
CODE OF REGULATIONS

TITLE 8. INDUSTRIAL RELATIONS

DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS CHAPTER 8. OFFICE OF THE DIRECTOR SUBCHAPTER 3. PAYMENT OF PREVAILING WAGES UPON PUBLIC WORKS

ARTICLE 7. WITHHOLDING OF FUNDS FROM CONTRACTOR – HEARING PROCEDURE

8 CCR 16410 (1999)

§ 16410. Definitions

As used in these regulations, the terms "awarding body," "contractor," and "subcontractor" shall have the same meaning as in Part 7 of Division 2 of the Labor Code. The term "affected subcontractor" shall mean a subcontractor whose alleged failure to pay the prevailing wage or to otherwise comply with the provisions of Labor Code §§ 1720-1815 resulted in the withholding of funds pursuant to Labor Code § 1727.

AUTHORITY:

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY:

1. New article 7 (sections 16410-16414) and section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day.

§ 16411. Notice to Contractor and Affected Subcontractor

(a) Upon the decision to withhold, retain or forfeit any sum from a payment due to a contractor as permitted by Labor Code § 1727, the Division of Labor Standards Enforcement shall give written notice to the awarding body, the contractor, and to any affected subcontractor, of the withholding, retention, or forfeiture.

(b) Said notice shall include the following information:

(1) The amount to be withheld, retained or forfeited.

(2) A short statement of the factual basis upon which said amount is to be withheld, retained, or forfeited, including, but not limited to, the computation of any wages found to be due, and the computation of any penalties assessed under Labor Code § 1775.

(3) Notice of the right to request a hearing under these regulations, and of the manner in which, and the time within which a hearing must be requested.

(c) Said notice shall be sent by certified mail to the last known address of the contractor, and to the last known address of any affected subcontractor. The records of the State Contractors' License Board may be used to determine the address of a contractor or affected subcontractor.

AUTHORITY:

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

§ 16412. Withholding, Retention, or Forfeiture

(a) When notice has been sent as provided in section 16411, above, the awarding body shall proceed to withhold, retain, or forfeit the amount stated in the notice, pursuant to Labor Code § 1727. Such withholding, retention, or forfeiture shall be subject to the right of a contractor or affected subcontractor to request a hearing, as provided in section 16413, below, and further subject to the right of a contractor or a contractor's assignee to bring suit against the awarding body as provided by Labor Code §§ 1731-1733.

(b) Nothing in these regulations shall extend, or affect in any way, the statutory time limits provided by Labor Code §§ 1731-1733.

AUTHORITY:

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

§ 16413. Request for Hearing

(a) A contractor or subcontractor desiring a hearing regarding the withholding, retention, or forfeiture of an amount may request such a hearing by letter postmarked

within 30 days of the date of the mailing of the notice provided by section 16411, above, mailed to the awarding body, and to:

Division of Labor Standards Enforcement
Legal Section
455 Golden Gate Avenue, 9th floor
San Francisco, California 94102

(b) A request for hearing shall contain a statement of all factual and legal grounds upon which the withholding is contested, identifying the specific element or elements, issue or issues, being contested, including, but not limited to:

(1) the classification of workers included in the computation of wages found to be due;

(2) the hours worked by such workers;

(3) the prevailing wage requirements applicable to such classifications;

(4) the amounts paid to such workers;

(5) the assessment and computation of statutory penalties;

(6) any erroneous mathematical calculations.

Assertions of fact included in the statement shall be supported by documentary evidence, e.g., time cards, canceled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidence which reflect job assignments, work schedules by days and hours, and evidence of the disbursement by way of cash, check, or in whatever form or manner, of funds to a person or persons by job classification and/or

skill, and, if appropriate, declarations under penalty of perjury.

AUTHORITY:

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

§ 16414. Hearing

(a) Upon receipt of a timely request for a hearing, the Labor Commissioner, or his or her deputy or agent shall, within 30 days, hold a hearing to determine whether reasonable cause exists to withhold and retain the funds identified in the notice provided under section 16411, above.

(b) The hearing date may be continued at the request of the party seeking the hearing upon a showing of good cause.

(c) The burden of proof at such hearing shall be as provided in Labor Code § 1733.

(d) The decision of the Labor Commissioner shall consist of a notice of findings, findings, and an order, which shall be served on the awarding body and all parties to the hearing within 15 days after the conclusion of the hearing by regular first class mail at the last known address of the party on file with the Labor Commissioner. The awarding body shall promptly abide by any decision of the Labor Commissioner with respect to the notice to withhold.

(e) The hearing pursuant to this section shall only determine whether reasonable cause exists for the withholding, retention, or forfeiture of funds pursuant to Labor Code § 1727. A hearing pursuant to this section shall not be deemed to be dispositive as to the contractor's (or affected subcontractor's) compliance with prevailing wage laws. Any decision rendered shall have no res judicata or collateral estoppel effect, and will not preclude the Labor Commissioner from pursuing any action provided by Labor Code § 1775 or any other statutory or common law remedy against any party. Neither the failure of a party to request a hearing nor the Labor Commissioner's decision after a hearing shall preclude the contractor or affected subcontractor from pursuing any other remedy provided by existing law.

AUTHORITY:

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

(3)

No. 98-1204

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENTS IN REPLY

Responding to the arguments advanced by Respondent, G & G Fire Sprinklers, Inc., in its Opposition Brief, Petitioners respectfully submit:

1. The Ninth Circuit's Holding That Respondent Has a Property Interest In Amounts Purportedly Due For Work Performed on Public Works Projects Is In Conflict With This Court's Determination of What Constitutes a Property Interest Under the Due Process Clause.

After the petition for certiorari was filed, this Court decided *American Manufacturers Mutual Insurance Co. v. Sullivan*, 119 S.Ct. 977 (1999) (*"Sullivan"*), which squarely rejected the same theory of what constitutes a "property" interest for Due Process Clause purposes that the Ninth Circuit relied upon here. If the Court does not grant certiorari to hear this case itself, the Court should grant certiorari to vacate the Ninth Circuit's decision and remand the case for reconsideration in light of *Sullivan*.

In *Sullivan*, as the Court will recall, the plaintiffs contended that they had a "property" interest in workers' compensation benefits to pay for medical treatment. 119 S.Ct. at 989-990. The pertinent state statutes, however, provided that an employee was entitled only to "reasonable" and "necessary" medical treatment – and that "disputes over the reasonableness and necessity of particular treatment must be resolved *before* an employer's obligation to pay – and an employee's entitlement to benefits – arise." *Id.* at 990 (emphasis in original.) Consequently, the entire Court agreed that the plaintiffs did not have a

property interest in the benefits themselves *before* such dispute had been resolved. *Id.* at 990 (majority opinion); *id.* at 990-991 (Ginsburg, J., concurring); *id.* at 991 (Breyer, J., joined by Souter, J., concurring); *id.* at 991-992 (Stevens, J., concurring and dissenting).

The majority reserved the analytically distinct due process question whether the plaintiffs had

> "a property interest in their *claims* for payment, as distinct from the payments themselves, such that the State . . . could not finally reject their claims without affording them appropriate procedural protections. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982)." *Sullivan*, 119 S.Ct. at 990 n.13 (emphasis added.)

As explained in the Petition for Certiorari, the Ninth Circuit made the very same error in reasoning in this case as the Third Circuit made in *Sullivan*, conflating a disputed claim for payment with a property interest in the payment itself. *See* Petition at 18. The Ninth Circuit held that the plaintiff has a property interest "aris[ing] from its public works contract; it has a property interest in being paid in full for the construction work it has completed." Petition A-17. Under California law, however, contracts for public works expressly provide that contractors are *not* entitled to be "paid in full" if workers on the project have not been paid prevailing wages, and that an awarding body shall withhold payment until a dispute about whether prevailing wages have been paid is resolved. Cal. Labor Code §§ 1727, 1774, 1775. The withholding of payment pending resolution of a dispute about whether a contract has been performed is, of course, the norm. "It is not unfair, in and of itself, . . . to withhold payment . . .

pending resolution of its amount." *Sullivan,* 119 S.Ct. at 991 (Stevens, J., concurring and dissenting).[1]

Thus, as *Sullivan* makes clear, the Ninth Circuit mischaracterized the nature of the "property" interest in this dispute. When the parties to a bilateral contract dispute whether certain sums are owed under that contract, those sums cannot fairly be said to be the "property" of either party until the dispute is resolved. The most that can be said is that the contractor has a due process property interest in its *claim* for breach of contract. *See Logan v. Zimmerman Brush Co., supra.*

2. Respondent Understates the Sweep of the Ninth Circuit's Holding that a Contractor's Right to File a Breach of Contract Lawsuit Against an Awarding Body that Withholds Disputed Amounts Purportedly Due Under a Public Works Contract is Constitutionally Inadequate.

In order to make this case appear *sui generis* and therefore unworthy of review, the Opposition relies upon

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[1] The applicable subcontracts on the public works projects at issue herein no doubt contain similar, explicit provisions allowing the withholding of payment for deficient performance. G & G has never put any of the applicable subcontracts in the record and it has pointedly refrained from contending that prime contractors were not entitled to retain payments under such contracts if the awarding bodies withheld sums from the prime contractor on account of a subcontractor's deficient performance. Indeed, the reason an awarding body enters into a single contract with just the prime contractor is to avoid having to deal separately with each of the subcontractors. Instead, the task of ensuring each subcontractor's performance is left to the prime contractor.

purported distinctions between the present case and an ordinary public contract dispute that either do not exist or were not relevant to the Ninth Circuit's decision.

First, G & G argues that the entire key to this case is that the withholding of payment on the contract is made by California's Division of Labor Standards Enforcement ("DLSE"), rather than by the body awarding the contract. But that is incorrect. Under the law, "[b]efore making payments to the contractor of money due under a contract for public work, *the awarding body* shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to a stipulation in a contract for public work. . . . " Cal. Labor Code § 1727 (emphasis added). DLSE's role is to alert the awarding body to a violation of the prevailing wage requirement and to calculate the amount due. It is, in fact, the awarding body – a party to the contract – that withholds the funds.

Second, G & G contends that the Ninth Circuit's decision turns on the fact that G & G was a subcontractor, rather than the prime contractor. But the decision itself does not support that contention. The Ninth Circuit plainly held that (1) there is a property interest in being paid under a public works contract, even if the awarding body disputes that the contract has been satisfactorily and fully performed, and (2) that the availability of an ordinary lawsuit for breach of contract after funds have been withheld is *not* sufficient to satisfy the Due Process Clause. *See* Pet. A-23, n.9 (rejecting the contention that a lawsuit for breach of contract – the remedy under Labor Code §§ 1731-1733 – would satisfy due process).

G & G does not dispute that this was the Ninth Circuit's holding. *See* Opp. Brief. at 20-25 (attempting to defend the Ninth Circuit's decision that a "lawsuit for breach of contract is not a constitutionally-adequate post-deprivation hearing.") That holding is just as applicable to contractors as it is to subcontractors and, if allowed to stand, its consequences for public contracting will be profound.

CONCLUSION

For all of the foregoing reasons, the Court should grant the petition for certiorari and either hear this case itself or vacate the decision below and remand the case for reconsideration in light of *Sullivan*.

Respectfully submitted,

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